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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ALLFIRST BANK,

Plaintiff,

v.

JOHN M. ORTENZIO,

Defendant.

FILED
HARRISBURG, PA
MAY 1 2002
MARY E. D'ANDREA, CLERK
CASE NO. 1:01-CV-786

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant, John M. Ortenzio ("Mr. Ortenzio"), by his undersigned counsel, submits this Memorandum of Law in Support of Defendant's Motion pursuant to Fed.R.Civ.P. 56 for an Order granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's Complaint in its entirety. In its Complaint, Plaintiff, Allfirst Bank ("Allfirst"), seeks to hold Mr. Ortenzio personally liable for the corporate obligations of CCI Construction Co., Inc. ("CCI") by bypassing the clear language of the contract between Allfirst and Mr. Ortenzio. However, Allfirst cannot establish any of its claims because it cannot establish that the manner in which CCI paid its contractual obligation was prohibited by the loan documents.

II. BACKGROUND

This lawsuit involves the interpretation of the contract between Mr. Ortenzio and Allfirst Bank (the "Suretyship Agreement") and its application to three notes: A line of credit that CCI executed on March 24, 1999, pursuant to which plaintiff provided CCI a long term, unsecured \$4 million line of credit ("the Line of Credit"); a Commercial Loan (equipment) Note dated November 20, 1998, pursuant to which plaintiff extended a \$2 million loan to CCI, secured by

CCI's equipment ("the Equipment Note"); and a Commercial Loan Note dated November 8, 1999, in the amount of \$1.2 million, ("the Short-term Note"), guaranteed by Mr. Ortenzio.¹ See, a true and correct copy of Plaintiff's Complaint, which is attached hereto as Exhibit "A" ("Complaint") at Exhibit "C" thereto. Allfirst contends that Mr. Ortenzio acted unlawfully when CCI repaid the short-term note from funds available from the line of credit.

In essence, CCI maintained a single checking account at Allfirst and all of the aforementioned loans were tied into a cash management facility. See, Deposition of Craig J. Schwartz ("Schwartz Dep.") at 85, 102-103, which is attached hereto as Exhibit "B." More specifically, any checks written on CCI's account at Allfirst increased the balance owed on the line of credit and, conversely, all revenues deposited to CCI's account had the effect of reducing the balance and, thereby, increasing the availability of funds that could be borrowed on the line of credit (Schwartz Dep. at 142). According to the commitment letter, CCI was required to maintain its primary account at Allfirst and was required to deposit all profits and all revenues from cash flow into this account. (Complaint, Exhibit "D"; Schwartz Dep. at 66-67). In addition, CCI's customers wire transferred payments directly to Allfirst to be deposited directly into the checking account. See Deposition of Sherri Phillips ("Phillips Dep.") at 17-18, which is attached hereto as Exhibit "C." When Allfirst loaned CCI the sum of \$1.2 million, pursuant to the short-term note, it decreased the balance owed on the line of credit by \$1.2 million. (Schwartz Dep. at 87-88). It is also undisputed that all payments that CCI made from its checking account, such as payroll, taxes, payments to vendors and re-payments on the \$2 million equipment note were drawn from the line of credit, and thereby had the same effect of increasing the balance on the \$4 million line of credit. (Phillips Dep. at 65-66, 70-71).

¹ Interpretation of contracts poses a question of law for the court to decide. Charles D. Stein Revocable Trust v. General Felt Indus., Inc., 749 A.2d 978, 980 (2000).

According to the deposition of Craig J. Schwartz, plaintiff's loan officer, who was responsible for the loans to CCI, the \$1.2 million short-term note was provided at the request of CCI, on a short-term basis, when CCI was encountering cash flow difficulties. (Schwartz Dep. at 56). Mr. Schwartz acknowledged in his deposition that there were no restrictions in the short-term note as to the source of funds that could be used to repay the note. (Schwartz Dep. at 62). He acknowledged that the short-term note was temporary and, indeed, had to be repaid no later than March 31, 2000. (Schwartz Dep. at 57, 62). He acknowledged that the plaintiff had initially sought to increase the \$4 million line of credit to a \$5 million line of credit, and had requested that Mr. Ortenzio guarantee the full \$5 million, but agreed to limit the defendant's guaranty to the \$1.2 million short-term note after Mr. Ortenzio refused to guarantee more than that amount. (Schwartz Dep. at 69).

Pursuant to the parties' agreement, the form language in the \$1.2 million short-term note was stricken to make it clear that Mr. Ortenzio's guarantee would extend to the \$1.2 million short-term note only, and not to the \$4 million line of credit or to any other loan facility at Allfirst. (Schwartz Dep. at 79). Mr. Schwartz acknowledged that Allfirst could have asked Mr. Ortenzio to guarantee up to \$1.2 million of any loan facility, i.e., not limit the guaranteed amount to the short-term note only, but failed to do so. (Schwartz Dep. at 193-194).

Mr. Schwartz acknowledged in his deposition that there were no restrictions in the short-term note as to the source of funds that could be used to repay the note. (Schwartz Dep. at 62). He admitted that there was no document that deals with how the loan was to be repaid, nor was there any document that states that the \$1.2 million short-term note could not be repaid by writing a check on CCI's checking account, thereby drawing on the line of credit. (Schwartz Dep. at 144). Mr. Schwartz acknowledged that Allfirst had expected that the short-term note would be paid from cash flow, but admitted that the expectation is not memorialized in any

document. (Schwartz Dep. at 146). Remarkably, Mr. Schwartz acknowledged **that there was absolutely no reason why Allfirst could not have documented an express prohibition so that the \$1.2 million short-term note could not be repaid by drawing down on the \$4 million line of credit.** (Schwartz Dep. at 147).

In connection with Allfirst's allegation in the Complaint at paragraph 17, Mr. Schwartz acknowledged that he was not aware of any facts which supported Allfirst's allegation that the repayment of CCI's \$1.2 million short-term loan was a "conditional payment" and would not be effective until the entire \$4 million line of credit had been repaid and satisfied. (Schwartz Dep. at 157). Mr. Schwartz was not aware of any banking practice, custom or regulation that would act as an impediment to Allfirst stating in any loan document that the \$1.2 million short-term note could not be paid off unless and until the \$4 million line of credit had been paid off first. (Schwartz Dep. at 159).

In connection with Allfirst's fraud count, Mr. Schwartz admitted that Mr. Ortenzio never made any direct representation that the \$1.2 million short-term note would not be paid from the \$4 million line of credit. (Schwartz Dep. at 163). Mr. Schwartz reiterated that there was no document anywhere that prohibited repayment of the \$1.2 short-term note from the \$4 million line of credit. (Schwartz Dep. at 193). He reiterated that there had been no impediment to Allfirst requiring Mr. Ortenzio to sign a document which would have prohibited the use of the line of credit to repay the \$1.2 million short-term note. (Schwartz Dep. at 193). Mr. Schwartz acknowledged that there was no impediment to Allfirst putting in any document that the loan could only be repaid from excess cash flow or excess profits. (Schwartz Dep. at 194-195).

On February 11, 2002, approximately one month prior to the due date, CCI repaid the \$1.2 million short-term note by drawing on the \$4 million line of credit and, thereby, merely reversing the book-entry transaction that was made when Allfirst had lent CCI the \$1.2 million a

few months earlier. At the time, CCI owed only approximately \$1.2 million on the \$4 million line of credit, so that the total amount due after the repayment was approximately \$2.4 million. (Schwartz Dep. at 90-91). In other words, according to Mr. Schwartz, at the time of the repayment of \$1.2 million short-term loan, there was a sufficient cushion under the \$4 million line of credit to repay the short-term note. (Schwartz Dep. at 200-201).² Notably, Mr. Schwartz admitted that **in hindsight, it would have been "prudent" for Allfirst to require Mr. Ortenzio to execute a document that would have specifically prohibited the repayment of the \$1.2 million short-term note from the \$4 million line of credit.** (Schwartz Dep. at 211-212).

On February 24, 2000, Allfirst declared a default under both the line of credit and the equipment note, but failed to provide CCI the 30 day notice and opportunity to cure, as required in the \$4 million note. Allfirst immediately seized all of CCI's assets, froze its checking account and dishonored all checks including payroll and taxes. (Schwartz Dep. at 122, 125). CCI's bankruptcy followed thereafter.

III. ARGUMENT – MR. ORTENZIO IS ENTITLED TO SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Whether a fact is material will be determined by reference to the "substantive evidentiary standards that apply to the case." Anderson v. Liberty Lobby,

² Allfirst's Complaint seeks to paint defendant as an opportunist who caused CCI to pay off the short-term note in order to avoid personal liability in view of the severity of CCI's financial distress, an assertion that is irrelevant in view of the documentation involved. In any event, it is worth noting that CCI's former Chief Financial Officer, Sheri Phillips, has testified that at the same time that CCI paid off the short-term note, CCI had over \$6.5 million in valid claims against governmental entities (Phillips Dep. at 97) and that CCI had, in fact, assumed and notified Allfirst that the short-term note would be timely re-paid by March, 2000 (Phillips Dep. at 49, 111). Ms. Phillips also testified that she had no recollection of Allfirst ever advising CCI or Mr. Ortenzio that the short-term note could not be repaid from the line of credit (Phillips Dep. at 76).

Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id.

A. Allfirst Has Failed to Establish a Claim for Breach of Contract Against Mr. Ortenzio.

Under Pennsylvania law, in order to prove a breach of contract, a plaintiff must show:

(1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach.

Wausau Underwriter's Ins. Co. v. Shisler, No. CIV.A. 98-5145, 2000 WL 233236 *5 (E.D. Pa. Feb. 28, 2000) (citing Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa. 1996)).

In this case, the evidence shows that a valid and binding contract existed between Allfirst and Mr. Ortenzio, i.e., the suretyship agreement pursuant to which Mr. Ortenzio guaranteed CCI's obligation under the short-term note, and that the terms of the short-term note did not prohibit repaying the short-term note from the line of credit. (Complaint, ¶¶25-30; Schwartz Dep. at 62, 144, 147). Because the short-term note was paid in a manner consistent with its terms, Mr. Ortenzio cannot be liable for breach of that agreement. Further, since Allfirst cannot establish breach, it cannot establish that damages resulted.

Allfirst is unable to establish that Mr. Ortenzio breached the short-term note for the following reasons:

1. The Bank Documents Did Not Preclude CCI from Paying the \$1.2 Million Note By Using the Available Line of Credit.

According to Mr. Schwartz, Allfirst's loan officer, there were no restrictions in the short-term note as to the source of funds that could be used to repay the note. (Schwartz Dep. at 62; Complaint, Exhibit "C"). While nothing prohibited Allfirst from negotiating a provision

restricting the source of funds, it failed to do so. (Schwartz Dep. at 193-195). The court cannot enforce a provision to an agreement that does not exist. See, Glen-Gery Corp. v. Wargel Constr. Co., 734 A.2d 926, 929 (Pa. Super. 1999) (stating that reviewing court may not rewrite the terms of a contract nor give them a meaning that conflicts with the language used).

2. The Bank Documents Did Not Specify How the \$1.2 Million Note was to be Repaid.

Mr. Schwartz further admitted that there were no documents dealing with how the loan was to be repaid, nor was there any document stating that the \$1.2 million short-term note could not be repaid by writing a check on CCI's only checking account, thereby drawing on the line of credit. (Schwartz Dep. at 144). In addition, Mr. Schwartz acknowledged that Allfirst had expected that the short-term note would be paid from cash flow, but admitted that the expectation is not memorialized in any document. (Schwartz Dep. at 46). Allfirst's failure to have its "expectation" integrated into the contract prevents it from establishing breach of contract. Because a fully integrated agreement was entered into by the parties, this court cannot enforce Allfirst's "expectations," which were not made part of the document. See, Anchel v. Shea, 762 A.2d 346, 352 (Pa. Super. 2000) (stating that when court is interpreting intention of parties to a contract, court must give effect to clear and unambiguous terms without reference to matters outside the contract).

3. The Only Way the \$1.2 Million Note Could Be Repaid Was by Using the Cash Management Facility Thereby Drawing on the Line of Credit.

As Allfirst was well aware, CCI maintained a single checking account at Allfirst and all of CCI's loans (the line of credit, the equipment note and the short-term note) were tied into a cash management facility. (Schwartz Dep. at 85, 102-103). Furthermore, CCI was required to deposit all collected receivables into this account. (Complaint, Exhibit "D"; Phillips Dep. at 17-18). Thus, CCI had no other account from which it could pay the \$1.2 million short-term note.

In fact, the bank's documents required CCI to maintain its primary account at Allfirst. (Schwartz Dep. at 66-67; Complaint at Exhibit "D").

4. The \$1.2 Million Short-term Note Was Repaid in the Same Manner as the Other Loans CCI had With Allfirst.

As Mr. Schwartz and Ms. Phillips, CCI's former controller testified, all payments that CCI made came from CCI's Allfirst Bank checking account that was tied to the cash management facility.³ These payments included not only payroll, taxes and payments to vendors, but also repayments on the equipment note. (Schwartz Dep. at 84-85; Phillips Dep. at 65-66, 70-71). Further, Allfirst accepted equipment note payments consistently and without question. However, despite accepting principal and interest equipment note payments written on the CCI checking account, Allfirst is now claiming that CCI's payment of the \$1.2 million short-term note from the exact same account is improper and constitutes breach of contract by CCI.⁴

5. The Repayment of the \$1.2 Million Note Was Merely a Reversal of the Initial Transaction.

When Allfirst loaned CCI the \$1.2 million, pursuant to the short-term note, it deposited the funds into the cash management facility. This deposit had the effect of increasing the availability on the line of credit by \$1.2 million and conversely, decreasing the balance owed on the line of credit by \$1.2 million. (Schwartz Dep. at 87-88). Therefore, when CCI repaid the

³ In an attempt to bypass Allfirst's total failure to include any prohibition of repayment of the short-term note from the line of credit in any of the loan documents, Allfirst contends such repayment was prohibited since the purpose of the loan, per the commitment, required CCI to use the loan proceeds to finance accounts receivable and work in progress. This contention overlooks that 1) the provision deals with CCI's use of funds in operating its business and not repayment of the short-term note; 2) Allfirst was aware at all relevant times that CCI was drawing on the line of credit to make payments to the IRS and monthly principal and interest payments on the equipment note; and 3) CCI had to repay the short-term note from the checking account as it was CCI's only account.

⁴ There is no evidence that CCI violated the terms of any of its agreements with Allfirst when it repaid the \$1.2 million short-term note. However, even if CCI somehow acted improperly, that fact does not advance Allfirst's efforts to hold Mr. Ortenzio personally liable here.

\$1.2 million short-term note by writing a check on its Allfirst account, this initial transaction was merely reversed. (Schwartz Dep. at 160-161).

Based upon the foregoing evidence, Allfirst cannot establish that the \$1.2 million short-term note was breached. Rather, the evidence shows that neither CCI nor Mr. Ortenzio did anything that was prohibited by the loan documents.

B. Allfirst Has Failed To Establish That Mr. Ortenzio Was Unjustly Enriched

1. The Quasi Contract Remedy of Unjust Enrichment Does Not Apply When the Parties' Relationship is Defined by a Contract.

In Count II of Allfirst's complaint, Allfirst claims that "[b]ecause CCI and Ortenzio used the proceeds of the revolving line of credit of CCI with Allfirst to repay the One Million Two Hundred Thousand Dollar loan without Allfirst's knowledge or consent and because Ortenzio was unjustly enriched thereby" Allfirst is entitled to the equitable remedy of equitable subrogation. (Complaint, ¶32). However, Count I of Allfirst's complaint alleges that numerous contracts existed between the bank and Mr. Ortenzio, which Mr. Ortenzio allegedly breached. (Complaint, ¶¶25-30). In other words, Allfirst has sued Mr. Ortenzio on both a breach of contract theory **and** a theory of equitable subrogation/quantum meriut, which is not proper.

Quantum meriut is "a quasi-contractual remedy in which a contract is implied-in-law under a theory of unjust enrichment; the contract is one that is implied in law, and 'not an actual contract at all.'" Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998-99 (3rd Cir. 1987) (citing Ragnar Benson, Inc. v. Bethel Mart Assoc., 308 Pa. Super. 405, 414, 454 A.2d 599, 603 (1982)). However, it is well settled under Pennsylvania law, that a claim for the quasi-contractual doctrine of unjust enrichment will not lie when the relationship between the parties is based upon a written agreement or express contract. Hershey Foods, 828 F.2d at 999 (citing Benefit Trust Life Ins. Co. v. Union Nat. Bank, 776 F.2d 1174 (3rd Cir. 1985). See also,

Halstead v. Motorcycle Safety Foundation, Inc., 71 F. Supp.2d 455 (E.D. Pa. 1999) (the finding of a valid contract prevents a party from recovering for unjust enrichment); Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. 1999)(a court may not make a finding of unjust enrichment where a written or express contract exists); Birchwood Lakes Communtiy Ass'n v. Com., 296 Pa. Super. 77, 442 A.2d 304, 308 (1982) (plaintiff cannot recover on a claim for unjust enrichment if such claim is based on breach of a written contract).

Here, Allfirst relies upon the contractual relationship between the bank and Mr. Ortenzio pursuant to the suretyship agreement as the basis for its breach of contract claim. (Complaint, Count I). In fact, it is undisputed that a contractual relationship existed between Allfirst and Mr. Ortenzio. This contract, the suretyship agreement, is attached to plaintiff's complaint. (Complaint, Exhibit B). Accordingly, summary judgment should be entered in favor of Mr. Ortenzio, as the cause of action for quantum meruit may not lie in light of the fact that it is undisputed that the parties' relationship is governed by a written contract.

C. Allfirst Has Failed To Establish A Cause Of Action For Equitable Subrogation.

1. There is No Equitable Reason to Grant Subrogation to Allfirst Because Allfirst Had the Ability to Negotiate for the Rights it Now Seeks to Acquire by Subrogation and Failed To Do So.

Pennsylvania recognizes the doctrine of equitable subrogation, which is defined as "the substitution of one entity in the place of another with reference to a lawful claim, demand, or right so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies or securities." Public Serv. Mut. Ins. Co. v. Kidder-Friedman, 743 A.2d 485, 488 (Pa. Super. 1999) (quoting Molitoris v. Woods, 422 Pa. Super. 1, 9, 618 A.2d 985, 989 (1992)). In order to successfully establish a claim for equitable subrogation, the plaintiff must show: "(1) the claimant paid the creditor to protect its own interests; (2) the claimant did

not act as a volunteer; (3) the claimant was not primarily liable for the debt; and (4) allowing subrogation will not cause injustice to the rights of others.” Tudor Dev. Group, Inc. v. United States Fidelity & Guar. Co., 968 F.2d 357, 362 (3rd Cir. 1992) (citing United States Fidelity & Guar. Co. v. United Penn Bank, 362 Pa. Super. 440, 524 A.2d 958 (1987)).

However, as the court pointed out in Tudor Dev. Group, equitable subrogation is not an appropriate remedy when the party was in a position to negotiate for the rights it seeks through subrogation but failed to do so. Id. at 363 (citing In re Carley Capital Group, 119 B.R. 646, 650 (W.D. Wis. 1990); In re Muzenrieder Corp., 58 B.R. 228, 231 (Bankr. M.D. Fla. 1986)). In Tudor Dev. Group, plaintiff-bank issued a letter of credit in favor of the township for the benefit of a real estate developer. Id. at 358. According to the terms of the letter of credit, the developer agreed to reimburse the bank if the bank honored the letter of credit. Id. at 359. As security, the bank received a collateral note from the developer’s general partner in the project and an assignment of the proceeds from certain performance bonds. Id. Upon the township’s demand, the bank paid the township in accordance with the letter of credit but was never reimbursed by the developer. Id.

In addition to finding that the bank failed to meet the technical requirements of equitable subrogation, the court held that because the bank was in a position to bargain for whatever security it thought appropriate when agreeing to issue the letter of credit, equitable subrogation would not be granted. Id. at 363. Accordingly, the court stated:

[N]ow that [the bank] has discovered that it made a poor business decision in not contracting for an assignment of rights in [certain performance bonds], it seeks our help in gaining additional rights. As the district court properly concluded, **there is no apparent reason why the court should exercise its equitable powers to rewrite the contract between the parties to give [the bank] more security than it bargained to receive.**” Id. (emphasis added).

In its complaint, Allfirst, as creditor under the line of credit, seeks to be equitably subrogated to the rights of Allfirst, as creditor under the \$1.2 million short-term note, so that it can hold Mr. Ortenzio personally liable for the balance due under the line of credit. (Complaint, ¶32). Allfirst's theory is based upon its claim that the balance on the line of credit had to be reduced to zero before CCI could use the line of credit to pay the \$1.2 million short-term note. (Complaint, ¶17). According to Allfirst, because CCI used the line of credit to repay the short-term note before the balance reached zero, Allfirst under the line of credit is entitled to all of the remedies available to Allfirst under the suretyship agreement.

Yet, Mr. Schwartz acknowledged in his deposition that there were no restrictions in the short-term note as to the source of funds that could be used to repay the note. (Schwartz Dep. at 62). Mr. Schwartz also admitted that there was no document stating that the \$1.2 million short-term note could not be repaid by writing a check on CCI's checking account, thereby drawing on the line of credit. (Schwartz Dep. at 144). Further, Mr. Schwartz stated that while Allfirst expected that the short-term note would be paid from cash flow, there was no document memorializing that expectation. (Schwartz Dep. at 146). Most importantly, Mr. Schwartz admitted that there was absolutely no reason why Allfirst could not have documented an express prohibition against CCI using the line of credit to repay the short-term note. (Schwartz Dep. at 147). Because Allfirst, by its own admission, did not negotiate for and obtain the rights it now seeks through equitable subrogation, the doctrine is inapplicable. Consequently summary judgment should be entered in favor of Mr. Ortenzio on Count II of Allfirst's complaint.

2. Allfirst is Not Entitled to an Equitable Remedy Because an Adequate Remedy Exists At Law.

In Pennsylvania, equitable relief is not permissible when a party has an adequate legal or statutory remedy. Tudor Dev. Group, 968 F.2d at 364 (citing Clark v. Pennsylvania State Police,

496 Pa. 310, 436 A.2d 1383, 1385 (1981). See also, Redmond Finishing Co., Inc. v. Ginsburg, 301 Pa. Super. 51, 446 A.2d 1330 (dismissing action in equity because plaintiff had earlier elected to proceed at law for monetary damages). “In determining whether a remedy is ‘adequate,’ [the court] must look to its availability and not to the likelihood of success.” Tudor Dev. Group, 968 F.2d at 364.⁵

Here, Allfirst has the option of proceeding with its breach of contract claim against Mr. Ortenzio or it can file a claim against CCI in the bankruptcy proceedings, both of which are available legal remedies. Regardless of whether Allfirst will be made whole under either of these adequate and available options, Allfirst is not entitled to the equitable remedy of subrogation. Thus, Mr. Ortenzio is entitled to summary judgment on Count II of Allfirst’s complaint.

D. Allfirst Has Failed To Establish A Cause Of Action For Fraud.

In Count III of its complaint, Allfirst purports to state a claim for fraud and seeks money damages. (Complaint, ¶34). In order to prove fraud, Pennsylvania law requires that the plaintiff establish the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. See, Lind v. Jones, Lang LaSalle Americas, Inc., 135 F. Supp.2d 616, 620 (E.D. Pa. 2001) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994); Gruenwald v. Advanced Computer

⁵ In Tudor Dev. Group, the court found that the bank had two legal remedies (seeking judgment against the developer’s general partner under the promissory note or suing the developer under the reimbursement agreement) and one statutory remedy available. Id. Therefore, the court concluded that “the fact that the remedies set forth above might not make [the bank] whole does not mandate a finding that such remedies are inadequate, thereby requiring this court to grant equitable relief.” Id.

Applications, 730 A.2d 1004, 1014 (Pa. Super. 1999)). Additionally, these elements must be proven by clear and convincing evidence, not the lesser preponderance of the evidence standard. Lind, 135 F. Supp.2d at 621. "Pennsylvania law requires that the trial judge to decide as a matter of law before he submits a case to the jury whether plaintiffs' evidence attempting to prove fraud is sufficiently clear, precise, and convincing to make out a prima facie case." Id. (citing Northeastern Power Co. v. Balcke-Durr, Inc., 49 F. Supp.2d 783 (1999)).

1. Allfirst Cannot Establish that Mr. Ortenzio Made a False Statement Upon Which it Relied.

Here, Allfirst cannot establish, by clear and convincing evidence, that Mr. Ortenzio made a false statement upon which Allfirst relied. In its complaint, Allfirst alleges that Mr. Ortenzio's delivery of the check written drawn upon CCI's line of credit with Allfirst was a representation that the payment of the \$1.2 short-term note was being made with funds other than those borrowed under the revolving line of credit. (Complaint, ¶34). However, in his deposition, Mr. Schwartz admitted that Mr. Ortenzio never made any direct representation that the \$1.2 million short-term loan would not be paid from the \$4 million line of credit and also testified that he did not investigate the source of the funds because he did not care. (Schwartz Dep. at 163). Mr. Schwartz further admitted that there was no loan document **anywhere** that prohibited repayment of the \$1.2 million short-term note from the line of credit. (Schwartz Dep. at 193). He also reiterated that there had been no impediment to the bank requiring that Mr. Ortenzio sign a document which would have prohibited use of the line of credit to repay the \$1.2 million short-term note. (Schwartz Dep. at 193). Finally, none of the loan documents require that Mr. Ortenzio make any representation to Allfirst regarding the source of the funds prior to repayment of the short-term note. Accordingly, Allfirst has failed to establish that Mr. Ortenzio made a

false statement upon which it relied and therefore, summary judgment should be entered in favor of Mr. Ortenzio on Count III.

2. Allfirst Cannot Establish that Mr. Ortenzio Intended to Deceive Allfirst.

Even if Allfirst were able to establish that Mr. Ortenzio made a false statement, it cannot establish, by clear and convincing evidence that Mr. Ortenzio intended to deceive Allfirst. As Allfirst admits in its Complaint, the payment of the \$1.2 million short-term note was a check written on CCI's line of credit with Allfirst. (Complaint, ¶34). Thus, because Mr. Ortenzio personally presented **an Allfirst check**, bearing the account number of CCI's line of credit with Allfirst, to Allfirst when repaying the short-term note, Allfirst cannot establish that Mr. Ortenzio failed to deceive Allfirst. Mr. Ortenzio made no attempt to hide the source of the funds. His failure to explicitly state the source of the funds, when none of the loan documents required any such representation, does not establish an intent to deceive.

IV. CONCLUSION

Based upon the forgoing reasons, Defendant, John M. Ortenzio, respectfully requests that this Honorable Court enter summary judgment in his favor.

Respectfully submitted,

BLANK ROME COMISKY & McCAULEY LLP

Dated: 4/30/02

BY: 

EDWARD I. SWICHAR, ESQUIRE
One Logan Square
Philadelphia, PA 19103
(215) 569-5500
Attorneys for Defendant, John M. Ortenzio

CERTIFICATE OF SERVICE

Edward I. Swichar, attorney for Defendant, John Ortenzio, hereby certifies that he caused a true and correct copy of Defendant's Memorandum of Law in Support of his Motion for Summary Judgment to be served upon the following on this ³⁰~~29~~th day of April, 2002, by first-class mail, postage prepaid:

Lawrence Gebhardt, Esquire
Gebhardt & Smith, LLP
The World Trade Center, Ninth Floor
Baltimore, MD 21020-3064


EDWARD I. SWICHAR

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

COPY

ALLFIRST BANK
25 S. Charles Street
Baltimore, MD 21201

Plaintiff,

v.

JOHN M. ORTENZIO
510 Orchard Drive
Lemoyne, PA

Defendant.

CASE NO.:

COMPLAINT

Plaintiff, Allfirst Bank ("Allfirst"), by its undersigned attorneys, sues Defendant, John M. Ortenzio ("Ortenzio"), and states as follows:

1. Allfirst is a banking institution chartered under the laws of the State of Maryland, with its principal place of business in Baltimore, Maryland. For this reason, Allfirst is a citizen of the State of Maryland.
2. Ortenzio is a citizen of the Commonwealth of Pennsylvania.
3. The matter in controversy in this case exceeds the sum or value of Seventy-Five Thousand Dollars (\$75,000.00), exclusive of interests and costs.
4. Subject matter jurisdiction exists in this case on the basis of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. Section 1332.
5. Ortenzio is the sole shareholder and president of CCI Construction Co., Inc. ("CCI"), a construction company with its principal office in the Commonwealth of Pennsylvania.
6. On or about March 24, 1999, Allfirst reestablished for the benefit of CCI a Four

Million Dollar unsecured revolving line of credit and cash management facility pursuant to a Film Cash Solutions Promissory Note ("Film Note"). A true and accurate copy of the Film Note is attached hereto as Exhibit A.

7. Pursuant to the revolving line of credit and cash management facility established in connection with the Film Note, CCI could borrow sums under the revolving line of credit by the issuance of checks drawn on its account with Allfirst up to the sum of Four Million Dollars. All collections made by CCI from customers were deposited, either directly by customers or by CCI upon receipt from customers, into CCI's account with Allfirst. Such deposits were applied on at least a daily basis to reduce the outstanding balance advanced under the revolving line of credit or, to the extent no amounts were outstanding under the revolving line of credit, into an interest bearing account, whose interest accrued to the benefit of CCI.

8. Ortenzio did not guaranty the revolving line of credit and had no obligation to Allfirst with respect to the repayment of the revolving line of credit. The sole obligor under the revolving line of credit was CCI.

9. In November of 1999, CCI experienced financial difficulties with respect to the cash flow generated by its business in the sense that its anticipated cash receipts were expected to be substantially less than its anticipated cash expenditures. To address the problem of CCI's expected cash flow shortfall, Ortenzio requested an additional extension of credit in the amount of One Million Two Hundred Thousand Dollars from Allfirst to or for the benefit of CCI.

10. Allfirst was unwilling to extend additional credit to CCI on the basis of its credit alone. Allfirst agreed to extend additional credit to CCI in the requested amount of One Million Two Hundred Thousand Dollars, but only upon the condition that Ortenzio guaranty and become a surety

and co-obligor with CCI on the additional One Million Two Hundred Thousand Dollars of indebtedness. To induce Allfirst to extend the additional One Million Two Hundred Thousand Dollars of credit to CCI, Ortenzio agreed to guaranty and become a surety and co-obligor on the additional One Million Two Hundred Thousand Dollars to be extended by Allfirst to CCI.

11. On November 8, 1999, CCI executed a Commercial Loan Note ("Commercial Note") in the face amount of One Million Two Hundred Thousand Dollars, payable on demand, and Allfirst advanced to CCI the principal amount of the Commercial Note. Exhibit B is a true and accurate copy of the Commercial Note executed by CCI on November 8, 1999.

12. Also on November 8, 1999, Ortenzio executed a Suretyship Agreement in which he guaranteed and became a surety for and a co-obligor with CCI with respect to the One Million Two Hundred Thousand Dollar loan extended by Allfirst to CCI., including all principal, interest, and attorneys fees and collection expenses with respect to collecting the sums due on the Commercial Note. In addition, Ortenzio agreed to pay all attorneys fees and costs of collection incurred by Allfirst in connection with enforcing the Suretyship Agreement and obtaining from Ortenzio the sums due thereon. A true and accurate copy of the Suretyship Agreement is attached hereto as Exhibit C.

13. Despite the advance of One Million Two Hundred Thousand Dollars by Allfirst to CCI pursuant to the Commercial Note, CCI's cash flow problems continued to exist and to worsen significantly.

14. On or about February 12, 2000, Ortenzio drew a check upon the account of CCI with Allfirst established in connection with the revolving line of credit in an amount sufficient to repay all sums then due and owing on the Commercial Note and delivered the aforementioned check to a teller of Allfirst with the instruction that the check was being delivered to Allfirst for the purpose of

satisfying in full all sums owed by CCI under the Commercial Note. In accordance with Ortenzio's instructions, the teller accepted the check and provided Ortenzio with a receipt therefore.

15. At the time Ortenzio drew the check on the account of CCI and delivered the check to Allfirst to repay the sums owed on the Commercial Note, CCI had an outstanding balance under its revolving line of credit. Payment of this check, drawn on the account of CCI established in connection with the revolving line of credit, required an advance under the revolving line of credit. Through this procedure, Ortenzio caused CCI to repay Allfirst on a loan which he had guaranteed with money borrowed from Allfirst under a revolving line of credit which he had not guaranteed.

16. In accepting the check presented by Ortenzio in payment of the One Million Two Hundred Thousand Dollar loan and in processing and paying the check drawn on the account of CCI, Allfirst was unaware that the payment being made by Ortenzio of the One Million Two Hundred Thousand Dollar loan was simply a further borrowing under the revolving line of credit.

17. The repayment of CCI's loan by Ortenzio was a conditional payment and was not effective unless and until such time as the outstanding balance and all advances under the revolving line of credit had been repaid and satisfied.

18. Ortenzio delivered the CCI check representing a draw upon the revolving line of credit to Allfirst in payment of the One Million Two Hundred Thousand Dollar loan for the express and sole purpose of ostensibly discharging his guaranty of the One Million Two Hundred Thousand Dollar loan and to avoid the obligations which he undertook in executing the Suretyship Agreement.

19. On or about February 18, 2000, Ortenzio met with representatives of Allfirst and provided them with detailed information relating to CCI's continuing cash flow shortages. This information indicated that CCI anticipated severe and substantial cash flow shortages over the

succeeding months, approximating \$3.8 million in February and reaching almost \$6 million by June, and that its business was in danger of failing.

20. As a result of the information provided by Ortenzio at the meeting on February 18, 2000, Allfirst on or about February 24, 2000 declared a default under an equipment loan extended to CCI on the basis of a material adverse change in CCI's financial condition and, as a result of the default under the equipment note, also declared a default under the Film Note. Allfirst notified CCI that no further advances would be made on the revolving line of credit and that Allfirst was demanding immediate repayment of all sums due and owing from CCI. Exhibit D attached hereto is a true and accurate copy of the default letter issued by Allfirst to CCI.

21. Between the date of Ortenzio's meeting with representatives of Allfirst on February 18, 2000 and the declaration of default on February 24, 2000, Allfirst realized that Ortenzio had caused CCI to repay the One Million Two Hundred Thousand Dollar loan with a borrowing under the revolving line of credit for the purpose of attempting to effect a discharge of his personal liability to Allfirst under the Suretyship Agreement.

22. Pursuant to the cash management facility established under the Film Note, collections from CCI customers were received by Allfirst on February 22, 24, and 25, 2000, aggregating the sum of \$2,317,291.28, which amount was applied by Allfirst to reduce the outstanding balance under the revolving line of credit.

23. On May 19, 2000, CCI filed for relief under Chapter 11 of the United States *Bankruptcy Code*. At the time of the filing of the petition under Chapter 11, the outstanding balance under the revolving line of credit owed by CCI to Allfirst for principal and interest, but exclusive of the costs and expenses of collection, was the sum of \$300,373.16. Allfirst has incurred costs and

expenses, including attorneys fees, in connection with the CCI bankruptcy case and will continue to incur such costs and expenses until the bankruptcy case has concluded.

24. On or about January 10, 2001, CCI, as debtor and debtor-in-possession, instituted an adversary proceeding in the United States Bankruptcy Court for the Middle District of Pennsylvania in a case entitled *CCI Construction Co., Inc. v. Allfirst Bank* (Adversary No. 1-01-00011A) in which CCI seeks to recover either as preferential or as an improper setoff the \$2,317,291.28 dollars in payments received by Allfirst on February 22, 24, and 25, 2000. Allfirst is contesting the claims of CCI in the bankruptcy case and has denied that the receipt of the payments were either a preference or an improper setoff. Allfirst has incurred litigation costs and expenses in connection with the defense of this preference action and will continue to incur litigation costs and expenses until the preference action has concluded.

COUNT I

25. Allfirst incorporates by reference the matters and facts alleged in paragraphs 1 through 24.

26. The purported payment by Ortenzio on behalf of CCI on or about February 12, 2000, was a conditional payment and did not have the effect of repaying the Commercial Note or discharging the One Million Two Hundred Thousand Dollar obligation of CCI to Allfirst except to the extent that Allfirst received non-avoidable repayments on the revolving line of credit in an amount sufficient to discharge in full the entire revolving line of credit and all sums due under the Film Note, including attorneys fees and collection expenses.

27. The revolving line of credit was never discharged in full and presently has an outstanding balance of \$326,655.72 with respect to principal and to interest accrued to May 1, 2001.

In addition, Allfirst has incurred attorneys fees and collection costs with respect to collection of the revolving line of credit and defense of the preference action in the bankruptcy case.

28. Because the revolving line of credit has never been satisfied and discharged in full, the One Million Two Hundred Thousand Dollar loan evidenced by the Commercial Note was never repaid in full and remains an obligation of CCI.

29. Because the One Million Two Hundred Thousand Dollar loan from Allfirst to CCI was never paid or discharged in full, the obligation of Ortenzio, as guarantor and surety and co-obligor with respect to the One Million Two Hundred Thousand Dollar loan and the Commercial Note, was never discharged or satisfied, such that Ortenzio remains liable under the Suretyship Agreement for all sums owed by CCI pursuant to the One Million Two Hundred Thousand Dollar loan and the Commercial Note.

30. The amount owed by Ortenzio pursuant to the Suretyship Agreement equals the lesser of (a) the unpaid balance of all principal and interest owed on the Commercial Note as though the February 12, 2000 payment had not been made or (b) the greater of (i) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, or (b) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, plus the amount of any recovery made by CCI in the preference action pending in the bankruptcy case, together with, in either case (a) or (b), all attorneys fees and collection costs in enforcing the Suretyship Agreement as provided therein.

COUNT II

31. Allfirst incorporates by reference the matters and facts alleged in paragraphs 1 through

24.

32. Because CCI and Ortenzio used the proceeds of the revolving line of credit of CCI with Allfirst to repay the One Million Two Hundred Thousand Dollar loan without Allfirst's knowledge or consent and because Ortenzio was unjustly enriched thereby, Allfirst, as creditor under the revolving line of credit, is equitably subrogated to the rights of Allfirst, as creditor under the One Million Two Hundred Thousand Dollar loan, including through such equitable subrogation the right to enforce and collect upon the Suretyship Agreement executed by Ortenzio.

33. The amount to which Allfirst is entitled to be equitably subrogated in the enforcement of the Suretyship Agreement against Ortenzio equals the lesser of (a) the unpaid balance of all principal and interest owed on the Commercial Note as though the February 12, 2000 payment had not been made or (b) the greater of (i) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, or (b) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, plus the amount of any recovery made by CCI in the preference action pending in the bankruptcy case, , together with, in either case (a) or (b), all attorneys fees and collection costs in enforcing the Suretyship Agreement as provided therein.

COUNT III

34. The payment by Ortenzio of the One Million Two Hundred Thousand Dollar loan extended by Allfirst to CCI through the use of a check drawn upon and reflecting an advance on CCI's revolving line of credit with Allfirst constituted common law fraud by Ortenzio in that (a) delivery of the check amounted to and was the equivalent of a representation by Ortenzio that payment of the One Million Two Hundred Thousand Dollar loan was being made by CCI or by

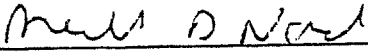
Ortenzio through CCI with monies other than those borrowed under the revolving line of credit. This representation by Ortenzio was knowingly false when made and was justifiably relied upon by Allfirst in giving Ortenzio and CCI a receipt for the payment and noting on its record that the obligations under the Commercial Note and Suretyship Agreement had been satisfied. Allfirst has suffered damages as a direct and proximate result of the knowingly false representation made by Ortenzio upon which it justifiably relied in an amount equal to the lesser of (a) the unpaid balance of all principal and interest owed on the Commercial Note as though the February 12, 2000 payment had not been made or (b) the greater of (i) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, or (b) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, plus the amount of any recovery made by CCI in the preference action pending in the bankruptcy case, , together with, in either case (a) or (b), all attorneys fees and collection costs in enforcing the Suretyship Agreement as provided therein.

WHEREFORE, Allfirst requests judgment:

1. As to Counts One, Two and Three for compensatory damages against Ortenzio in an amount equal to the lesser of (a) the unpaid balance of all principal and interest owed on the Commercial Note as though the February 12, 2000 payment had not been made or (b) the greater of (i) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, or (b) the unpaid principal balance and all accrued interest due under the revolving line of credit, together with all collection costs and attorneys fees, plus the amount of any recovery made by CCI in the preference action pending in the bankruptcy case, , together with, in either case (a) or (b), all attorneys fees and collection costs in enforcing the

Suretyship Agreement as provided therein;

2. As to Count Three, punitive damages in an amount equal to One Million Two Hundred Thousand Dollars or such other amount as is appropriate under the circumstances; and
3. As to Counts One, Two, and Three, an award of costs.



Lawrence J. Gebhardt
(Motion for *Pro Hac Vice* Admission Pending)

Michael D. Nord
Pennsylvania Bar # 52486
Ramsay M. Whitworth
Pennsylvania Bar # 85208
GEBHARDT & SMITH LLP
The World Trade Center, 9th Floor
401 E. Pratt Street
Baltimore, MD 21202

(410) 752-5830

Attorneys for Allfirst Bank

EXHIBIT A



* a division of
FMB Bank

FILM/CASH SOLUTIONS PROMISSORY NOTE
(PENNSYLVANIA)

Instructions to Loan Officer: Use for (a) loans to corporations, regardless of amount, and (b) loans to non-corporate borrowers when the only purpose of any such loan is business and the principal amount of such loan exceeds \$50,000.

\$ 4,000,000.00

Mechanicsburg, PA
(City) (State)

March 24, 1999

FOR VALUE RECEIVED, the undersigned ("Borrower") promises to pay on demand to the order of THE FIRST NATIONAL BANK OF MARYLAND ("Bank"), at any of Bank's offices, or at such other place as the holder of this Promissory Note may from time to time designate, the principal sum of FOUR MILLION and 00 /100 Dollars (\$ 4,000,000.00), or such other amount as may be advanced from time to time to Borrower, together with interest thereon at the rate or rates hereafter specified and any and all other sums which may be owing to Bank by Borrower pursuant to this Promissory Note. The following terms, as well as the applicable terms on Exhibit A, attached hereto and incorporated herein by reference, shall apply to this Promissory Note.

1. DEFINITIONS. The following terms have the following definitions:

- A. "Account" means the commercial checking account maintained by Borrower with Bank and designated as Account No. 28864514, together with any replacement account therefor.
- B. "Business Day" means any day other than Saturday, Sunday or other day on which commercial banks in the Commonwealth of Pennsylvania are authorized to close.
- C. "Incremental Advance Amount" means the amount indicated on Exhibit A as the Incremental Advance Amount. Each Loan must be an integral multiple of such amount.
- D. "Initial Excess Balance" means, for any Business Day, the amount by which the collected balance in the Account at the end of such Business Day after posting all credits to the Account (subject to funds availability), but prior to posting any debits to the Account, exceeds the Target Balance.
- E. "Line Availability" means, for any Business Day, an amount equal to the difference obtained by subtracting the aggregate principal balance outstanding under all Loans from the Maximum Line Amount.
- F. "Loan" means an advance of monies from Bank to Borrower pursuant to the terms of this Promissory Note; and the term "Loans" means more than one Loan.
- G. "Maximum Advance Amount" means an amount equal to the highest integral multiple of the Incremental Advance Amount which does not exceed the Line Availability.
- H. "Maximum Line Amount" means the amount indicated on Exhibit A as the Maximum Line Amount, which amount is the maximum aggregate principal balance of the Loans which may be outstanding at any one time.
- I. "Minimum Loan Advance" means the amount indicated on Exhibit A as the Minimum Loan Advance, which amount is the minimum principal amount of each Loan.
- J. "Presented Items" means, for any Business Day, the aggregate amount of debits which have been presented for payment against the Account.
- K. "Prime Rate" means a fluctuating annual rate of interest equal to the greater of: (i) that rate announced from time to time by Bank as its "prime rate;" or (ii) the rate obtained by adding one percent (1%) to the average rate, rounded to the nearest one-tenth of one percent, for three month maturity dealer placed commercial paper for the week most recently reported in the Federal Reserve Statistical Release No. H.15(519) entitled "Selected Interest Rates" or any succeeding publication.
- L. "Target Balance" means the amount indicated on Exhibit A as the Target Balance, which amount is the minimum collected balance that must be maintained in the Account.

2. PROCEDURES FOR LOANS. All Loans shall be made in the form of a transfer of funds into the Account in accordance with the procedures set forth in this paragraph. Borrower hereby irrevocably authorizes Bank to make Loans in accordance with the procedures set forth herein. At the end of each Business Day, Bank shall calculate the Initial Excess Balance and the aggregate amount of the Presented Items. In the event the Initial Excess Balance is less than the aggregate amount of the Presented Items, Bank shall make a Loan by transferring funds into the Account in an amount equal to the amount, which when added to the Initial Excess Balance, would be equal to the aggregate amount of the Presented Items; provided, however, that: (a) the principal amount of the Loan shall not be less than the Minimum Loan Advance; (b) the principal amount of the Loan must be an integral multiple of the Incremental Advance Amount, and therefore, if it would not otherwise be an integral multiple of the Incremental Advance Amount, the amount of the Loan will be rounded up to the next higher integral multiple of the Incremental Advance Amount unless there is insufficient Line Availability in which case the Loan amount will be the Maximum Advance Amount; and (c) the principal amount of the Loan shall not exceed the Maximum Advance Amount. If at any time the amount of the Initial Excess Balance is less than the amount of the Presented Items by an amount greater than the Maximum Advance Amount, Bank shall: (i) make a Loan by transferring funds into the Account in an amount equal to the Maximum Advance Amount; and (ii) determine, in its sole discretion, which Presented Items will be paid, and which Presented Items will not be paid. In the event the Initial Excess Balance is greater than the amount of the Presented Items, Bank shall post and pay all of the Presented Items. If, following Bank's posting and paying of all of the Presented Items, there remains a balance in the Account in excess of the Target Balance, Bank is hereby irrevocably authorized to debit the Account in an amount up to the portion of the balance in the Account which exceeds the Target Balance, and apply such sums to the outstanding balance of the Loans. Bank agrees to make such debit of the Account to repay sums outstanding under the Loans as of the end of each Business Day; provided, however, that in the event the option labeled "Cash Solutions Protection" is marked on Exhibit A attached hereto, Bank shall not automatically debit the Account to make payments on the Loans, but may do so, in its sole and absolute discretion.

3. TERMINATION. The procedure for making Loans, and the obligation of Bank to provide Loans, as set forth in this Promissory Note, may be terminated by Borrower upon ten (10) days prior written notice to Bank and may be terminated by Bank upon thirty (30) days prior written notice to Borrower. Upon termination, no further Loans shall be made under this Promissory Note, but all other terms of this Promissory Note (including, but not limited to, the holder's right to demand payment at any time and for any reason) shall remain in full force and effect.

4. INTEREST. From the date hereof until all sums due hereunder, including principal, interest, charges, fees and expenses are paid in full, the principal amount outstanding from time to time pursuant to this Promissory Note shall bear interest as follows (Check One):

[] Fluctuating Rate. At a fluctuating rate equal to _____ % per annum above the Prime Rate in effect from time to time. Bank at its discretion may charge a lesser rate from time to time. Interest on the principal amount outstanding shall be adjusted daily, with the rate for each day being adjusted to reflect the Prime Rate in effect at the close of business on that day. Bank makes loans at interest rates at, above and below the Prime Rate.

[X] Other (describe): Interest shall accrue at a rate per annum equal to the Bank's Base Rate minus 1/2% as in effect from time to time.

5. CALCULATION OF INTEREST. Interest shall be calculated on the basis of a three hundred sixty (360) days per year factor applied to the actual days on which there exists an unpaid balance hereunder.

6. REPAYMENT. Borrower shall make payments of principal and interest in accordance with the following terms:
 (a) Principal: ALL SUMS OUTSTANDING UNDER THIS PROMISSORY NOTE, INCLUDING THE PRINCIPAL AMOUNT OF ALL OF THE LOANS, ARE IMMEDIATELY DUE IN FULL UPON THE FIRST TO OCCUR OF: (I) THE DEMAND OF THE HOLDER OF THIS PROMISSORY NOTE, WHICH DEMAND MAY BE MADE AT ANY TIME AND FOR ANY REASON, IN THE SOLE AND ABSOLUTE DISCRETION OF THE HOLDER OF THIS PROMISSORY NOTE; OR (II) THE OCCURRENCE OF ANY DEFAULT UNDER THE TERMS OF THIS PROMISSORY NOTE *with 30 days written notice*
 (b) Interest: Borrower shall make payments of all accrued and unpaid interest on the 31st day of each successive month, beginning on March 31, 1999 and continuing until all sums outstanding hereunder are paid in full.

Borrower may prepay this Promissory Note in whole or in part at any time or from time to time without premium or additional interest.

7. LATE PAYMENT CHARGE. If any payment due hereunder (including any payment in whole or in part of principal) is not received by the holder within fifteen (15) calendar days after its due date, Borrower shall pay a late payment charge equal to five percent (5%) of the amount then due.

8. APPLICATION OF PAYMENTS. All payments made pursuant to this Promissory Note shall be applied first to accrued and unpaid interest, then to unpaid expenses and charges payable hereunder, and then to principal, or in such other order or proportion as the holder, in the holder's sole discretion, may elect from time to time.

9. *See below - Unsecured*
 SECURITY. Sums due under this Promissory Note are secured by, and Borrower grants to Bank a security interest in, all deposits and property of Borrower now or at any time hereafter in the possession of or on deposit with Bank whether as custodian or depository or in any other capacity. Bank shall have the right to set-off and apply against the obligations of Borrower to Bank evidenced by this Promissory Note any sums of Borrower at any time on deposit with Bank whether such deposits are special, time or demand, provisional or final. In addition, this Promissory Note is secured by any property described as collateral in any security agreement, pledge agreement or other document previously, simultaneously, or hereafter entered into by Borrower in connection with any obligation or liability of Borrower to Bank or any corporate affiliate of Bank, such other security documents include but are not limited to the following:

[] Security Agreement(s)

[] Real estate mortgage or deed of trust on property known as _____ located in _____ County/City, State of _____.

[X] Other (describe): Unsecured

This Promissory Note specifically incorporates by reference, as if fully set forth herein, all of the language and provisions of the security documents described generally or specifically above.

10. REPRESENTATIONS AND WARRANTIES. Borrower (and if more than one Borrower, each Borrower) represents and warrants to Bank that the following statements are true, correct and complete as of the date hereof, and as of the date each Loan is made hereunder: (a) it is duly organized and in good standing under the laws of the state in which it is organized; (b) it has the full power and authority to execute, deliver and perform this Promissory Note; (c) neither such execution, delivery and performance, nor compliance by it with the provisions of this Promissory Note will conflict with or result in a breach or violation of its organizational documents, or any judgment, order, regulation, ruling or law to which it is subject or any contract or agreement to which it is a party or to which any of its assets and properties are subject; (d) this Promissory Note constitutes its legal, valid and binding obligation enforceable in accordance with its terms; (e) there is no litigation or proceeding pending or, to the knowledge of its representative signing this Promissory Note on its behalf, threatened against or affecting it which might materially adversely affect its business, financial condition or operations or its ability to perform and comply with this Promissory Note; (f) all financial statements and information furnished or to be furnished to Bank hereunder have been and will be prepared in accordance with generally accepted accounting principles and fairly present its financial condition as of the dates thereof and the results of its operations for the period covered thereby; (g) it is not in violation of any applicable federal, state or local law, statute, rule, regulation or ordinance and has not received any notice nor is the subject of any investigation to the effect that its operations are not in material compliance with any such law, statute, rule, regulation or ordinance, including, without limitation, applicable environmental, health and safety laws and regulations; (h) since September 2, 1974, no pension, employee benefit, multi-employer, profit sharing, savings, stock bonus or other deferred compensation plan ("Plan") maintained by it or any trade or business group with which it is affiliated subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA) has been terminated, no lien exists against Borrower in favor of the Pension Benefit Guaranty Corporation ("PBGC"), and no "reportable event" (as such term is defined in ERISA) has occurred with respect to any such Plan, and Borrower has not incurred any "accumulated funding deficiency" within the meaning of ERISA or any liability to the PBGC in connection with any Plan; and (i) no information, exhibit, report, statement, certificate or document furnished by Borrower or any other person to Bank in connection with the Loans, this Promissory Note or the negotiation thereof contains any material

misstatement of fact or omitted to state a material fact or any fact necessary to make the statements contained herein or therein not misleading.

11. **DEFAULT.** Any of the following will be a default under this Promissory Note: (a) failure to pay any principal, expense, fee, charge or interest when due, or failure to perform any other obligations hereunder; (b) a default by any Borrower upon any of the existing or future obligations of any Borrower to Bank; (c) a default by any guarantor or other person other than Borrower that is now or hereafter liable upon or in connection with any of the obligations of any Borrower to Bank or that has granted any lien or security interest to or for the benefit of Bank to secure any of the obligations of any Borrower to Bank ("Other Obligor"), upon any of the existing or future obligations of any Other Obligor to Bank; (d) a default in any other agreement, instrument or document between any Borrower or Other Obligor and Bank, or any corporate affiliate of Bank, including, without limitation, any security document referred to above, whether previously, simultaneously, or hereafter entered into; (e) ~~a material adverse change in the financial condition of any Borrower or Other Obligor from that expressed in the financial statement most recently submitted to Bank prior to the date of this Promissory Note, as determined in good faith by Bank in its sole discretion;~~ (f) institution of bankruptcy, insolvency, reorganization or receivership proceedings by or against any Borrower or Other Obligor in any state or federal court; (g) the appointment of a receiver, assignee, custodian, trustee or similar official under any federal or state insolvency or creditors' rights law for any property of any Borrower or Other Obligor; (h) ~~failure of any Borrower or Other Obligor to furnish to Bank such collateral or additional collateral as Bank may in good faith request;~~ (i) any warranty, representation, or statement to Bank by or on behalf of any Borrower or Other Obligor proving to have been incorrect in any material respect when made or furnished; (j) the occurrence of any event which is, or would be with the passage of time or the giving of notice or both, a default under any indebtedness of any Borrower or Other Obligor to any person other than Bank; (k) any material loss, theft or substantial damage, which is not fully insured, to any of the assets of any Borrower or Other Obligor, or the sale, transfer, lease, encumbrance or other disposition of all or any material part of the assets of any Borrower or Other Obligor other than in the ordinary course of business of Borrower or Other Obligor; (l) the entry of any final judgment against any Borrower or Other Obligor for the payment of money in excess of \$5,000.00; (m) the levy upon or attachment of any assets of any Borrower or Other Obligor; (n) ~~the recordation of any federal, state or local tax lien against any Borrower or Other Obligor;~~ (o) a change of ownership or dissolution, merger, consolidation, liquidation or reorganization of any Borrower or Other Obligor which is a corporation, partnership or other legal entity; (p) ~~the death of any Borrower or Other Obligor who is a natural person;~~ (q) failure of any Borrower or Other Obligor to furnish to Bank such financial information as Bank may require from time to time, including, but not limited to, such financial statements as Bank may require; (r) failure of any Borrower or Other Obligor to comply with all laws, rules, regulations and decrees to which such Borrower or Other Obligor may be subject, the violation of which may have a material adverse effect on the business operation or financial condition of such Borrower or Other Obligor; (s) ~~the acquisition by a Borrower of all or substantially all of the assets, properties or equity interest of any other person or entity without Bank's prior written consent;~~ (t) failure of any Borrower to maintain its existence in good standing in the jurisdiction of its organization; (u) any of the licenses or permits which are necessary to the conduct of any Borrower's business as now conducted is not maintained in full force and effect; or (v) ~~the determination in good faith by Bank, in its sole discretion, that the ability of any Borrower or Other Obligor to pay or perform any of their respective obligations to Bank is impaired for any reason.~~

12. **REMEDIES.** Upon a default, in addition to all other rights and remedies available to the holder of this Promissory Note under any document or agreement between Borrower and Bank or under applicable law, the holder of this Promissory Note, in the holder's sole discretion and without notice or demand, may raise the rate of interest accruing on the unpaid principal balance outstanding under this Promissory Note by two (2) percentage points above the rate of interest otherwise applicable. The Bank shall have no further obligation to provide any Loans to Borrower following: (a) a demand by Bank for payment hereunder; or (b) a default under this Promissory Note. Borrower agrees that a default under this Promissory Note is a default by Borrower under all other liabilities and obligations of Borrower to the holder, and that the holder shall have the right to declare immediately due and payable all liabilities and obligations owed by Borrower to the holder of this Promissory Note.

13. **CONFESSION OF JUDGMENT.** Borrower irrevocably and unconditionally authorizes any attorney admitted to practice before any court of record in the United States to appear on behalf of Borrower in any court in one or more proceedings, or before any clerk thereof or prothonotary or other court official, and appear for, to confess and enter judgment against Borrower, at any time, whether before or after the occurrence of any default hereunder, with or without avowment of default, with or without complaint filed, and without prior notice or opportunity of Borrower for prior hearing, in favor of the holder of this Promissory Note in the full amount outstanding on this Promissory Note (including principal, accrued interest and any and all charges, fees and expenses) plus court costs, plus attorneys' fees equal to fifteen percent (15%) of the unpaid balance of principal, interest, charges, and other sums outstanding hereunder, with release of all errors and without right of appeal. Borrower waives the benefit of any and every statute, ordinance, or rule of court which may be lawfully waived conferring upon Borrower any right or privilege of exemption, homestead rights, appraisalment, stay of execution, or supplementary proceedings, or other relief from the enforcement or immediate enforcement of a judgment or related proceedings on a judgment. (To the extent prohibited by applicable law, any judgment obtained by confession shall not constitute a lien on any real property located in Pennsylvania which is the residence of the Borrower.) The authority and power to appear for and enter judgment against Borrower shall not be exhausted by one or more exercises thereof, or by any imperfect exercise thereof, and shall not be extinguished by any judgment entered pursuant thereto; such authority and power may be exercised on one or more occasions from time to time, in the same or different jurisdictions, as often as the holder shall deem necessary or advisable. **BORROWER HEREBY ACKNOWLEDGES THAT THE CONFESSION OF JUDGMENT PROVISIONS HEREIN CONTAINED WHICH AFFECT AND WAIVE CERTAIN LEGAL RIGHTS OF BORROWER HAVE BEEN READ, UNDERSTOOD AND VOLUNTARILY AGREED TO BY BORROWER.**

14. **EXPENSES.** Borrower shall pay all costs and expenses, including attorneys' fees (to the extent not prohibited by law) incident to the making of the Loans. Borrower shall pay all costs and expenses incurred by Bank in collecting sums due under this Promissory Note, including without limitation the costs of any lien, judgment or other record searches, appraisals, travel expenses and the like. In addition, if this Promissory Note is referred to an attorney for collection, whether or not judgment has been confessed or suit has been filed, Borrower shall pay all of the holder's costs, fees (including, but not limited to, the holder's attorneys' fees, charges and expenses) and all other expenses resulting from such referral.

15. **AMENDMENTS.** The fees and charges required to be paid by Borrower in connection with the Loans may, at any time and from time to time, be amended by Bank, upon prior written notice thereof to Borrower and otherwise in compliance with applicable law. Any such amendment shall become effective on the first day of the month in which Borrower obtains a Loan, after the date specified in the notice of amendment (which date shall be not less than thirty (30) days from the date

the notice was mailed to Borrower), or upon such other date as may be required in accordance with applicable law. If Borrower obtains a Loan after the date specified in the notice, the changes in the fees and charges described in the amendment shall apply to all outstanding unpaid indebtedness and obligations under this Promissory Note, whether incurred or arising prior to, upon, or after the effective date of the amendment.

16. **NEGOTIABLE INSTRUMENT.** Borrower agrees that this Promissory Note shall be deemed to be a negotiable instrument, even though this Promissory Note may not qualify under applicable law, absent this paragraph, as a negotiable instrument.
17. **WAIVERS.** Borrower, and all parties to this Promissory Note, whether maker, indorser, or guarantor, waive presentment, demand, notice of dishonor and protest.
18. **EXTENSIONS OF MATURITY.** All parties to this Promissory Note, whether maker, indorser, or guarantor, agree that the maturity of this Promissory Note, or any payment due hereunder, may be extended at any time or from time to time without releasing, discharging, or affecting the liability of such party.
19. **NOTICES.** Any notice or demand required or permitted by or in connection with this Promissory Note, without implying the obligation to provide any notice or demand, shall be in writing at the address set forth below or to such other address as may be hereafter specified by written notice to Bank by Borrower. Any such notice or demand shall be deemed to be effective as of the date of hand delivery or facsimile transmission, one (1) day after dispatch if sent by telegram, mailgram, overnight delivery, express mail or federal express, or three (3) days after mailing if sent by first class mail with postage prepaid.
20. **ASSIGNABILITY.** This Promissory Note may be assigned by Bank or any holder at any time.
21. **JOINT AND SEVERAL LIABILITY.** If more than one person or entity is executing this Promissory Note as Borrower, all liabilities under this Promissory Note shall be joint and several with respect to each of such persons or entities.
22. **BINDING NATURE.** This Promissory Note shall inure to the benefit of and be enforceable by Bank and Bank's successors and assigns and any other person to whom Bank may grant an interest in Borrower's obligations to Bank, and shall be binding and enforceable against Borrower and Borrower's personal representatives, successors and assigns.
23. **INVALIDITY OF ANY PART.** If any provision or part of any provision of this Promissory Note shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Promissory Note and this Promissory Note shall be construed as if such invalid, illegal or unenforceable provision or part thereof had never been contained herein, but only to the extent of its invalidity, illegality or unenforceability.
24. **MAXIMUM RATE OF INTEREST; COMMERCIAL LOAN.** Notwithstanding any provision of this Promissory Note to the contrary, Borrower shall not be obligated to pay interest hereunder in excess of the maximum rate of interest permitted by the laws of any state determined to govern this Promissory Note or the laws of the United States applicable to loans in such state. If any provision of this Promissory Note shall ever be construed to require the payment of any amount of interest in excess of that permitted by applicable law, then the interest to be paid hereunder shall be held subject to reduction to the amount allowed under applicable law, and any sums paid in excess of the interest rate allowed by law shall be applied in reduction of the principal balance outstanding under this Promissory Note. Borrower acknowledges that it has been contemplated at all times by Borrower that the laws of the Commonwealth of Pennsylvania will govern the maximum rate of interest that it is permissible for the holder of this Promissory Note to charge Borrower under this Promissory Note. Borrower warrants that this Promissory Note evidences a loan made solely to acquire or carry on a business or commercial enterprise.
25. **CHOICE OF LAW; CONSENT TO VENUE AND JURISDICTION.** This Promissory Note shall be governed, construed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania, even if the Commonwealth of Pennsylvania rules governing conflicts of laws would otherwise require that the laws of another jurisdiction govern this Promissory Note. Borrower consents to the jurisdiction and venue of the courts of any city or county in the Commonwealth of Pennsylvania or to the jurisdiction and venue of the United States District Court for the Middle District of Pennsylvania in any action or judicial proceeding brought to enforce, construe or interpret this Promissory Note.
26. **UNCONDITIONAL OBLIGATIONS.** Borrower's obligations under this Promissory Note shall be the absolute and unconditional duties and obligations of Borrower and shall be independent of any rights of set-off, recoupment or counterclaim which Borrower might otherwise have against the holder of this Promissory Note, and Borrower shall pay absolutely the payments of principal, interest, fees, charges and expenses required hereunder, free of any deductions and without abatement, diminution or set-off.
27. **ACTIONS AGAINST BANK.** Any action brought by Borrower against Bank which is based, directly or indirectly, or in whole or in part, upon this Promissory Note or any matter related to this Promissory Note shall be brought only in the courts of the Commonwealth of Pennsylvania.
28. **WAIVER OF JURY TRIAL.** Borrower (by execution of this Promissory Note) and Bank (by acceptance of this Promissory Note) agree that any suit, action, or proceeding, whether claim or counterclaim, brought or instituted by Borrower, Bank, or any successor or assign of Borrower or Bank on or with respect to this Promissory Note or which in any way relates, directly or indirectly, to the obligations of Borrower to Bank under this Promissory Note, or the dealings of the parties with respect thereto, shall be tried only by a court and not by a jury. **BORROWER AND BANK HEREBY EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY SUCH SUIT, ACTION, OR PROCEEDING.** Borrower and Bank acknowledge and agree that this provision is a specific and material aspect of the agreement between the parties and that Bank would not enter into the transaction with Borrower if this provision were not a part of their agreement.

[SIGNATURES CONTAINED ON NEXT PAGE]

IN WITNESS WHEREOF, and intending to be legally bound hereby, the undersigned executes this Promissory Note under seal, as Borrower, as of the date first written above.

WITNESS/ATTEST*:

CCI Construction Co, Inc
 (Name of Organization)
7500 Old Gettysburg Rd
 (Street Address)
Camp Hill, Pa 17011
 (City-State-Zip)
717-909-4224 717-909-4600
 (Telephone) (Facsimile)

E. M. Avery
 (Print Name)
E. M. AVERY, ASSISTANT SECRETARY
 (Print Name)

By: [Signature] (SEAL)
 (Authorized Signature)
Sheri Phillips, CFO
 (Print Name and Title)

 (Print Name)

By: _____ (SEAL)
 (Authorized Signature)

 (Print Name and Title)

*NOTE: Attestation by a corporate officer of another corporate officer's capacity to sign is required in all corporate transactions.

If Borrower is an individual he or she should sign below:

WITNESS:

 (Print Name)

 (SEAL)
 (Print Name)

 (Street Address)

 (City-State-Zip)

 (Telephone) (Facsimile)

EXHIBIT A
FILM/Cash Solutions Promissory Note

Account Number: 28864514

Borrower: CCI Construction Co., Inc.

The terms and provisions of the option checked below are incorporated in and made a part of the FILM/Cash Solutions Promissory Note executed by Borrower to which this Exhibit A is attached:

☒ **FILM LOAN OPTION** - The following terms apply to this option:

- i) Maximum Line Amount - \$4,000,000.00
- ii) Minimum Loan Advance - \$0.01
- iii) Incremental Advance Amount - \$1.00
- iv) Target Balance - \$ 0
- v) Fees - 0

☐ **CASH SOLUTIONS PROTECTION OPTION** - The following terms apply to this option:

- i) Maximum Line Amount - _____
- ii) Minimum Loan Advance - \$500.00
- iii) Incremental Advance Amount - \$500.00
- iv) Target Balance - \$ _____
- v) Fees - _____

☐ **CASH SOLUTIONS MAXIMIZER OPTION** - The following terms apply to this option:

- i) Maximum Line Amount - _____
- ii) Minimum Loan Advance - \$500.00
- iii) Incremental Advance Amount - \$500.00
- iv) Target Balance - \$ _____
- v) Fees - _____
- vi) Balance in Account is not transferred to investments until all Loans are paid in full.

☐ **CASH SOLUTIONS LOAN OPTION** - The following terms apply to this option:

- i) Maximum Line Amount - _____
- ii) Minimum Loan Advance - \$500.00
- iii) Incremental Advance Amount - \$500.00
- iv) Target Balance - \$ _____
- v) Fees - _____

WITNESS/ATTEST:

BORROWER:

CCI Construction Co., Inc.

By: _____

Name: _____

Title: _____

(SEAL)

If Borrower is an individual he or she should sign below:

 Name: _____ (SEAL)

EXHIBIT B



allfirst

COMMERCIAL LOAN NOTE
LINE OF CREDIT.

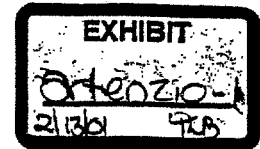
COPY

\$ 1,200,000.00

Date 11-8-99

FOR VALUE RECEIVED, the undersigned, CCI Construction Co., Inc., a (corporation/partnership/limited liability company/individual) (the "Borrower"), jointly and severally (if more than one), promise to pay to the order of ALLFIRST BANK, a Maryland state-chartered commercial bank (the "Bank") or its assigns, the principal amount of ONE MILLION TWO HUNDRED THOUSAND & NO/100 DOLLARS to be paid as follows:
Principal is payable on demand.

Interest is payable monthly, accrued to date of Bank's notice thereof, with all accrued and unpaid interest, and unpaid fees and charges, due with the principal payment.



Interest shall accrue at a rate per annum equal to the Bank's Base Rate minus .50000% as in effect from time to time. The term "Bank's Base Rate," which is not necessarily the lowest rate of interest charged by the Bank, is defined as the prime rate of interest for loans established by the Bank from time to time.

Interest shall be calculated on the basis of the actual number of days elapsed and a year of 360 days. Both principal and interest are payable in lawful money of the United States of America at any office of Bank in immediately available funds. If any payment due hereunder is received by the Bank more than fifteen (15) calendar days after its due date, the Borrower shall pay a late payment charge equal to five percent (5%) of the amount then due or \$10.00, whichever is greater.

APPLICATION OF PAYMENTS. All payments made hereunder shall be applied first to late payment charges or other sums owed to the Bank, next to accrued interest, and then to principal, or in such other order or proportion as the Bank, in its sole and absolute discretion, may elect from time to time.

SECURITY. The payment of this note and any renewals, extensions and modifications thereof, and the payment, performance and discharge of all other present or future indebtedness, obligations and undertakings (individual, joint, several, direct, contingent, or otherwise) of the Borrower to or for the benefit of the Bank, whether arising directly to the Bank under this note or under any other agreement, promissory note or undertakings now existing or hereinafter entered by the Borrower to the Bank (collectively, the "Liabilities") is secured by the property described in, and under and pursuant to the terms and conditions of that certain:

Collateral as set forth in a Security Agreement - Specific Collateral dated 11/1/99.

As additional security for the Liabilities, Borrower grants the Bank a lien upon and a security interest in any securities, instruments or other personal property of Borrower now or hereafter in Bank's possession and in any deposit balances now or hereafter held by Bank for Borrower's account and in all proceeds of any such personal property or deposit balances. Such liens and security interests shall be independent of Bank's right of setoff.

STATEMENT OF ACCOUNT. The Bank will furnish the Borrower with a statement of account on a periodic basis. Each and every statement of account shall be final, conclusive and binding upon the Borrower in all respects as to the outstanding balance of principal and as to all loans, fees, interest, charges, payments, receipts, balances, and all other matters reflected therein unless the Borrower, within ten (10) days after the posting thereof in the United States mail, shall give notice to the Bank in writing of any objections which the Borrower may have to any such statement of account; and in such event, only those items expressly objected to in such written notice shall be considered to be disputed by the Borrower and all other items shall be binding.

PAYMENT OF COSTS. In addition to the principal and interest payments specified above, the Borrower shall pay to the Bank or any other holder of this note, upon demand, all costs and expenses (including reasonable attorneys' fees, whether or not litigation is commenced) which may be incurred by the Bank or such holder in the collection or enforcement of this note. Said costs shall include reasonable attorneys' fees and costs in bankruptcy proceedings and any costs and attorneys' fees incurred for any action or proceeding in relation to the loan transaction, including but not limited to the joinder of Bank in any action between the Borrower and a third party.

DEFAULTS. The Borrower shall be in default hereunder upon the occurrence of any of the following events: (a) the nonpayment when due of any amount payable on any of the Liabilities, or the failure of any Obligor to observe or perform any agreement of any nature whatsoever with the Bank (the term "Obligor" as used herein being meant to include the Borrower and all persons liable on the note or any renewals, extensions, or modification thereof, such as endorsers, sureties, or guarantors); (b) if any Obligor becomes insolvent or makes an assignment for the benefit of creditors, or if any petition is filed by or against any Obligor under any provisions of any law or statute alleging that such Obligor is insolvent or unable to pay debts as they mature; (c) the entry of any judgment against any Obligor or the issuing of any attachment or garnishment against any property of any Obligor or the occurrence of any change in the financial condition of any Obligor which in the sole judgment of the Bank is materially adverse; (d) the dissolution, merger, consolidation or reorganization of any Obligor, which is an entity such as a corporation, limited partnership, partnership or limited liability company; (e) the death of any Obligor who is a natural person; (f) any information heretofore or hereinafter furnished to the Bank by any Obligor in connection with the loan evidenced hereby or any suretyship or guaranty should be materially false; and (g) the failure of any Obligor to furnish such financial and other information as the Bank may reasonably request. If this Note is payable on demand, Bank's right to demand payment hereof shall not be restricted or impaired by the absence of, non-occurrence of or waiver of a default hereunder, and it is understood that Bank may demand payment at any time ^{after giving borrower a 30-day written notice of default.}

ACCELERATION AND ENFORCEMENT RIGHTS. Whenever the Borrower shall be in default as aforesaid, (1) unless the Bank elects otherwise, the entire unpaid amount of such of the Liabilities as are not then due and payable shall become immediately due and payable without notice ^{30 days written notice} to or demand on any Obligor, and (2) the Bank may at its option exercise from time to time any or all rights and remedies available to it at law or in equity. The Borrower waives all right to stay of execution or garnishment and exemption of property in any action to enforce any of the Liabilities.

JUDGMENT. The Borrower ^{reasonable attorney fees} does hereby authorize and empower any attorney of any court of record of Pennsylvania or elsewhere to appear for and enter judgment against Borrower for the above sum, with or without declaration, with costs of suit, including reasonable attorneys' fees and fees in bankruptcy proceedings, if any, release of errors, without stay of execution, and with fifteen (15%) percent added for collection fees, and the Borrower further agrees that real, personal or mixed property may be sold or garnished upon any writ of execution or writ of garnishment as now or hereafter provided by law or the Pennsylvania Rules of Civil Procedure governing the enforcement of judgments; and Borrower hereby waives and releases all relief from any appraisal, stay or exemption laws of any state now in force or hereafter enacted. If a copy hereof, verified by affidavit, shall have been filed in such proceeding, it shall not be necessary to file the original as a warrant of attorney. The Borrower (and each of them, if more than one) hereby waives the right to any stay of execution and the benefit of all exemption laws now or hereafter in effect. No single exercise of this warrant and power to confess judgment shall be deemed to exhaust this power, whether or not any such exercise shall be held by any court to be invalid, voidable or void, but this power shall continue undiminished and may be exercised from time to time as often as Bank shall elect until all sums due hereunder shall have been paid in full.

WAIVERS. The Borrower hereby waives presentment, notice of dishonor and protest. The Borrower hereby waives and releases all errors, defects and imperfections of a procedural nature in any proceedings instituted by the Bank hereunder, as well as all benefit that might accrue to the Borrower by virtue of any present or future laws exempting any property, real or personal, or any part of the proceeds arising from any sale of such property, from garnishment, attachment, levy or sale under execution, or providing for any stay of execution, exemption from civil process, or extension of time for payment. The Borrower agrees that any property, real or personal, that may be levied upon pursuant to any writ of execution or writ of garnishment issued on any judgment by virtue of this note, may be sold, in whole or in part, in any order desired by the Bank.

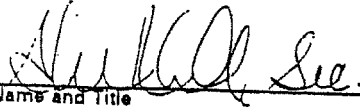
HOLDERS IN DUE COURSE. This note may be assigned by the Bank or any subsequent holder of this note at any time or from time to time. The Borrower hereby agrees that no subsequent holder of this note to whom the note was transferred for value shall be subject to any claims or defenses which the Borrower may have against a prior holder, all of which are waived as to such subsequent holder, and that all such subsequent holders shall have all of the rights of a holder in due course even though the subsequent holder may not qualify, under applicable law, absent this paragraph, as a holder in due course.

MISCELLANEOUS. Any failure of the Bank to exercise any right hereunder shall not be construed as a waiver of the right to exercise the same or any other right at any other time. If the Borrower consists of more than one person, such persons shall be jointly and severally liable hereunder. The Borrower intends this to be a sealed instrument and to be legally bound hereby. This note shall inure to the benefit of and be enforceable by the Bank and its successors and assigns and be binding and enforceable against the Borrower, its legal representatives, successors and permitted assigns. All issues arising hereunder shall be governed by the laws of Pennsylvania without giving effect to choice of law rules.

WITNESS OR ATTEST:

CCI Construction Co., Inc.

BORROWER:



Name and Title (Seal)

Name and Title (Seal)

Name and Title (Seal)

Name and Title (Seal)

(Name of Individual, Corporation,
Partnership, or Limited Liability Company)

By: 
Name and Title (Seal)

By: _____
Name and Title (Seal)

By: _____
Name and Title (Seal)

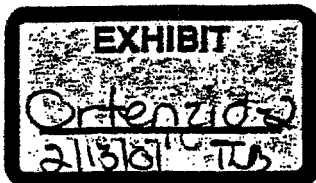
By: _____
Name and Title (Seal)

2500 Old Gettysburg Road Camp Hill, PA 17001
Address

EXHIBIT C



allfirst



SURETYSHIP AGREEMENT

under the \$1,200,000 commercial loan note dated 11-8-99 JMD

Date

11-8-99

For value received, the Undersigned, jointly and severally, hereby unconditionally agree to make prompt payment of all obligations, indebtedness and liabilities due Allfirst Bank, a Maryland state-chartered commercial bank, hereinafter called "Bank," of any kind, whether now existing or hereafter arising, due or which may become due, whether by acceleration or otherwise, ~~absolute or contingent joint or several, direct or indirect, secured or unsecured~~ by CCI Construction Co., Inc.

hereinafter called "Borrower," all such obligations being hereinafter further described and collectively called the "Liabilities," and the Undersigned agree(s) to pay all expenses (including attorneys' fees and legal expenses, whether or not litigation is commenced) paid or incurred by the Bank in endeavoring to collect the Liabilities, or any part thereof, whether or not bankruptcy has been declared, and in enforcing this Suretyship Agreement. The liability of the Undersigned hereunder is a primary and direct obligation without regard to any other obligor or security or collateral held by the Bank.

The Undersigned hereby waive all notices of any character whatsoever with respect to this Suretyship Agreement and the Liabilities of the Borrower for which the Suretyship Agreement has been executed, including but not limited to notice of the acceptance hereof and reliance hereon and notice of default by the Borrower. The Undersigned hereby give consent to the Bank to the taking of, or failure to take, from time to time, without notice to the Undersigned, any action of any nature whatsoever with respect to the Liabilities of the Borrower, with respect to any rights against any person or persons, including the Borrower and any of the Undersigned, in any property, including, but not limited to, any postponements, compromises, indulgences, waivers, extensions, exchanges, releases, and satisfactions. The Undersigned shall remain fully liable on this Suretyship Agreement, notwithstanding any of the foregoing.

This Suretyship Agreement shall in all respects be a continuing, absolute and unconditional one, and shall remain in full force and effect (notwithstanding, without limitation, the death, incompetency or dissolution of any of the Undersigned or that at any time, or from time to time, all Liabilities may have been paid in full). This Suretyship Agreement is subject to discontinuance as to any of the Undersigned only upon actual receipt by the Bank of written notice from such Undersigned, or any person duly authorized and acting on behalf of such Undersigned, of the discontinuance hereof as to such Undersigned; provided, however, that no such notice of discontinuance shall affect or impair any of the agreements and obligations of such Undersigned hereunder with respect to (a) any and all Liabilities existing prior to the time of actual receipt of such notice by the Bank, (b) any and all Liabilities created or acquired thereafter pursuant to any previous binding commitments made by the Bank, (c) any and all extensions or renewals of any of the foregoing, (d) any and all interest on any of the foregoing, and (e) any and all expenses paid or incurred by the Bank in endeavoring to collect any of the foregoing and in enforcing this Suretyship Agreement against such Undersigned. All obligations of the Undersigned under this Suretyship Agreement shall, notwithstanding any such notice of discontinuance, remain fully in effect until all Liabilities not subject to an effective notice of discontinuance (including any extensions or renewals of any thereof) and all such interest and expenses shall have been paid in full. Any notice of discontinuance by or on behalf of any one of the Undersigned shall not affect or impair the obligations hereunder of any other of the Undersigned.

At the option of Bank, all Liabilities of Borrower shall become immediately due and payable by the Undersigned, without demand or notice, in the event any of the following shall occur: (a) Borrower shall fail to make any payment or meet any other liability when due; (b) Borrower or the Undersigned shall fail to observe or perform any obligation, term, condition or provision of Borrower under any document evidencing or securing the Liabilities, this Suretyship Agreement or any other agreement, document, certificate, instrument of security, suretyship or guaranty given by Borrower to Bank; (c) Any representation, warranty or certificate made or furnished by Borrower to Bank, in connection with the Liabilities or any other agreement, document, certificate, instrument of security, suretyship or guaranty given by Borrower to Bank or in any certificate, financial statement or separate assignment made hereunder shall be materially false; (d) Borrower or any of the Undersigned shall make an assignment for the benefit of creditors; (e) Proceedings in bankruptcy or for reorganization of Borrower or any of the Undersigned or for the readjustment of any of their debts under the Bankruptcy Act, as amended, or in any part thereof, or under any other act or law, whether state or federal, for the relief of debtors now or hereafter existing, shall be commenced by or against Borrower or the Undersigned; (f) A receiver or trustee shall be appointed for Borrower or any of the Undersigned or for any substantial part of their assets; or any proceedings are instituted for the dissolution, or the full or partial liquidation, of Borrower or any of the Undersigned; (g) Material adverse changes in the financial condition of the Borrower or any of the Undersigned; (h) A death of Borrower or any of the Undersigned or, if Borrower or the Undersigned is a partnership, the death of any general partner; or (i) Borrower or any of the Undersigned ceases doing business as a going concern.

As security for the Liabilities hereunder, the Undersigned hereby grants Bank a security interest in the following:
NONE

Together with a right, without demand or notice of any kind, at any time and from time to time when any amount shall be due and payable by the Undersigned hereunder and in such order of application as the Bank may elect, to set-off against all monies, deposits or other property of any kind, without limitation, owned by the Undersigned or in which the Undersigned has a joint or contingent interest and which are in possession of Bank for any reason whatsoever.

The Undersigned further agree that, if at any time, any part of any payment theretofore applied by the Bank to any of the Liabilities is or must be returned by the Bank for any reason whatsoever (including, without limitation, the insolvency, bankruptcy or reorganization of the Borrower), such Liabilities shall, for the purposes of this Suretyship Agreement, to the extent that such payment is or must be rescinded or returned, be deemed to have continued in existence, notwithstanding such application by the Bank, and this Suretyship Agreement shall continue to be effective or be reinstated, as the case may be as to such Liabilities, all as though such application by the Bank had not been made. In such an event the Undersigned hereby waives any right of contribution, subrogation or indemnification against the Borrower, for a period of twelve (12) months subsequent to the last payment made or due to be made from Borrower to Bank.

The Bank may, from time to time, whether before or after any discontinuance of this Suretyship Agreement, at its sole discretion and without notice to the Undersigned (or any of them), take any or all of the following actions: (a) retain or obtain a security interest in any property to secure any of the Liabilities or any obligation hereunder; (b) retain or obtain the primary or secondary obligation of any obligor or obligors in addition to the Undersigned, with respect to any of the Liabilities; (c) extend or renew for one or more periods (whether or not longer than the original period), alter or exchange any of the Liabilities, or release or compromise any obligation of any of the Undersigned hereunder or any obligation of any nature of any other obligor with respect to any of the Liabilities; (d) release its security interest in, or surrender, release or permit any substitution or exchange for, all or any part of any property securing any of the Liabilities or any obligation hereunder, or extend or renew for one or more periods (whether or not longer than the original period) or release, compromise, alter or exchange any obligations of any nature of any obligor with respect to any such property; and (e) resort to the Undersigned (or any of them) for payment of any of the Liabilities, whether or not the Bank shall have resorted to any property securing any of the Liabilities for payment of any of the Liabilities, or any obligation hereunder or shall have proceeded against any other of the Undersigned or any other obligor primary or secondarily obligated with respect to any of the Liabilities.

Any amounts received by the Bank from whatsoever source on account of the Liabilities may be applied by Bank toward the payment of such of the Liabilities and in such order of application, as the Bank may from time to time elect; and, notwithstanding any payments made by or for the account of the Undersigned pursuant to this Suretyship Agreement, the Undersigned shall not be subrogated to any rights of the Bank until such time as this Suretyship Agreement shall have been discontinued as to all of the Undersigned and the Bank shall have received payment of the full amount of all Liabilities and of all obligations of the Undersigned hereunder. The Bank shall not be obligated under any theory of law relating to the marshalling of payment received or security interest granted under the terms of this Suretyship Agreement.

The Bank may, from time to time, before or after any discontinuance of this Suretyship Agreement, without notice to the undersigned (or any of them), assign or transfer any or all of the Liabilities or any interest therein; and, notwithstanding any such assignment or transfer or any subsequent assignment or transfer thereof, such Liabilities shall be and remain Liabilities for the purpose of this Suretyship Agreement and each and every immediate and successive assignee or transferee of any of the Liabilities or of any interest therein shall, to the extent of the interest of such assignee or transferee in the Liabilities, be entitled to the benefits of this Suretyship Agreement to the same extent as if such assignee or transferee were the Bank; provided, however, that unless the Bank shall otherwise consent in writing, the Bank shall have an unimpaired right prior and superior to that of any such assignee or transferee, to enforce this Suretyship Agreement for the benefit of the Bank, as to those of the Liabilities which the Bank has not assigned or transferred.

No modification or waiver of any of the provisions of this Suretyship Agreement shall be binding upon the Bank except as expressly set forth in writing duly signed by each of the Undersigned and the Bank. No action of the Bank permitted hereunder shall in any way affect or impair the rights of the Bank and the obligation of the Undersigned under this Suretyship Agreement. For the purpose of this Suretyship Agreement, Liabilities shall include a claim or obligation of the Borrower to the Bank, notwithstanding any right or power of the Borrower or anyone else to assert any claim or defense as to the invalidity or unenforceability of any such obligation and no such claim or defense shall affect or impair the obligations of the Undersigned hereunder. The Liability of the Undersigned for Liabilities of Borrower incurred on or prior to the date hereof shall not exceed, at any time, the aggregate principal amount of ONE MILLION TWO HUNDRED THOUSAND & NO/100 DOLLARS (\$ 1,200,000.00), plus interest as stated in the evidence of indebtedness given by Borrower to Bank and fifteen percent (15%) attorneys' commission; provided that this Suretyship Agreement shall also be applicable to and extend to any and all Liabilities, plus interest and costs as aforesaid, of Borrower arising after the date hereof even if the total of such Liabilities plus the Liabilities outstanding on or prior to the date hereof exceed the aforementioned aggregate principal amount. If no limitation is inserted in this paragraph, there is no limit to the liability of the Undersigned to the Bank.

The creation or existence from time to time of Liabilities in excess of any amount to which the right of recovery under this Suretyship Agreement is limited is hereby authorized, without notice to the Undersigned (or any of them), and shall in no way affect or impair the rights of the Bank and the obligation of the Undersigned under this Suretyship Agreement.

The Undersigned, jointly and severally, do hereby authorize and empower any prothonotary or clerk or attorney of any court of record of Pennsylvania or elsewhere, to appear for and confess judgment against any or all of the Undersigned in favor of Bank for the total liability of the Undersigned as set forth herein together with interest thereon, with or without declaration, with costs of suit, release of errors, without stay of execution or garnishment and with fifteen percent (15%) for collection fees, and waive the right of inquisition, and the benefit of all exemption laws now or hereinafter enacted, and agree to condemnation and the sale of real estate or personal property, or a writ of execution.

In the event the Bank acquires any property securing this Suretyship Agreement after a foreclosure sale as to real property or a public auction sale as to personal property, the Undersigned agrees to indemnify and hold the Bank harmless from any loss, costs, or expense which the Bank may sustain as a result of: (a) selling the real or personal property so acquired for less than the total sums owed by the Borrower to the Bank, provided, however, that any such sale by the Bank is done in a commercially reasonable manner or (b) any action brought against the Bank under §548 or §544(b) of the United States Bankruptcy Code, as amended, on the ground that the consideration paid by the Bank for the real or personal property was not "fair equivalent value," within the contemplation of §544(b) of the United States Bankruptcy Code, as amended, or any applicable state fraudulent conveyance act.

The Undersigned waive and release the Bank from any damages which the Undersigned may incur as a result of any intentional or unintentional or negligent action or inaction of the Bank impairing, diminishing, or destroying any of the Undersigned's rights of subrogation which the Undersigned may have upon payment of any of the Borrower's obligations. The Undersigned acknowledges previously having waived, under certain conditions, any such rights.

The Undersigned hereby agrees that this Suretyship Agreement shall apply to any obligation which the Bank may incur as the result of any payment to Bank by or on behalf of the Borrower which is determined to be a preference payment benefiting the undersigned.

If a photostatic copy hereof shall have been filed in any of said proceedings, it shall not be necessary to file the original as a warrant of attorney. The foregoing warrant and power to confess judgment shall not be deemed to have been exhausted by any single exercise thereof, whether or not any such exercise shall be held by any court to be invalid, voidable or void, but may be exercised from time to time, as often as the Bank shall elect, until all sums payable or that may become payable by each of the Undersigned have been paid in full.

A subsequent guaranty or suretyship by the Undersigned or any other guarantor or surety of the Borrower's Liabilities given to the Bank shall not be deemed to be in lieu of or to supersede or terminate this Suretyship Agreement but shall be construed to be additional or supplementary unless otherwise expressly provided therein; and in the event the Undersigned or any other guarantor or surety has given to the Bank a previous guaranty or Suretyship Agreement, this Suretyship Agreement shall be construed to be additional or supplementary, and not to be in lieu thereof or to terminate such previous Suretyship Agreement, guaranty or guaranties unless expressly so provided herein.

This Suretyship Agreement shall be binding upon the Undersigned, and upon the heirs, legal representatives, successors and assigns of the Undersigned, and to the extent that the Borrower or any of the Undersigned is an entity such as a partnership, limited partnership, limited liability company, corporation or any other similar entity, all references herein to the Borrower and to the Undersigned, respectively, shall be deemed to include any successor or successors, whether immediate or remote, to such entity. If more than one party shall execute this Suretyship Agreement, the term "Undersigned" as used herein shall mean all parties executing this Suretyship Agreement and each of them, and all such parties shall be jointly and severally obligated hereunder.

This Suretyship Agreement shall be construed in accordance with and governed by the laws of the Commonwealth of Pennsylvania without giving effect to choice of law rules. Wherever possible each provision of this Suretyship Agreement shall be interpreted in such manner as to be effective and valid under applicable law but if any provision of this Suretyship Agreement shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Suretyship Agreement.

INTENDING TO BE LEGALLY BOUND HEREBY, the Undersigned have set their respective hands and seals: the day and year first above written.

WITNESS OR ATTEST:

(SURETY) John M. Ortensio

Title

Title

Title

By:

Title:

(SEAL)

By:

Title:

(SEAL)

By:

Title:

(SEAL)

EXHIBIT D

LAW OFFICES
GEBHARDT & SMITH LLP
NINTH FLOOR
THE WORLD TRADE CENTER
BALTIMORE, MARYLAND 21202-3064

BALTIMORE (410) 752-5830
WASHINGTON (301) 470-7468

WRITER'S DIRECT DIAL NUMBER

(410) 385-5100
Writer's E-Mail Address:
lgbbh@gebbsmith.com

FACS
401 381

Refer To File No 18610

February 24, 2000

Via Facsimile and Federal Express

4027 1282 2484

CCI CONSTRUCTION CO., INC.
2500 Old Gettysburg Road
Camp Hill, Pennsylvania 17011-7307

Attn: John M. Ortenzio, President

RE: \$4,000,000 Unsecured Revolving Line Of Credit and
\$2,000,000 Secured Equipment Purchase Line of Credit
Extended By Allfirst Bank To CCI Construction Co., Inc.

Dear Mr. Ortenzio:

This firm represents Allfirst Bank ("Lender"), which has extended to CCI Construction Co., Inc. ("Borrower") (a) a revolving line of credit in the maximum principal amount of \$4,000,000 pursuant to a FILM/Cash Solutions Promissory Note dated March 24, 1999 ("Film Note") and related documents, and (b) a secured equipment purchase line of credit in the stated principal amount of \$2,000,000 pursuant to a Commercial Loan Note ("Commercial Note") and a Security Agreement, both dated November 20, 1998, and related documents. This letter is being sent at the specific request and direction of the Lender.

As a result of the occurrence of various events which are materially adverse to the financial condition of the Borrower, and as a further result of the insolvency of the Borrower, the Lender hereby declares a default under the Commercial Loan Note and under the Security Agreement. In consequence of this declaration of default under the equipment purchase line of credit, the Lender hereby accelerates and declares immediately due and payable all sums presently outstanding and owing under the equipment purchase line of credit.

As a result of the default under the equipment line of credit, the Borrower is, in turn, in default under the cross-default provisions of Section 11 of the FILM Promissory Note, and the Lender hereby declares the default. In consequence of this default the Bank hereby accelerates and demands immediate payment of all sums presently due and owing under the FILM Promissory Note.

Because of the default under the FILM Promissory Note and the Bank's acceleration and demand for immediate payment of the sums due thereunder no further sums will be advanced under the revolving line of credit evidenced by the FILM/Cash Solutions Promissory Note, effective immediately. Any checks or other payments items in transit will not be honored by the Lender.

GEBHARDT & SMITH

CCI CONSTRUCTION CO., INC.

February 24, 2000

Page 2

The total sums presently due and outstanding under the equipment purchase line of credit and the revolving line of credit, respectively, are as follows:

Equipment Purchase Line Of Credit

Principal	\$1,244,116.74
Interest through February 23 2000	\$ 5,237.80
Total	<u>\$ 1,249,354.54</u>
Interest per day thereafter: \$231.54	

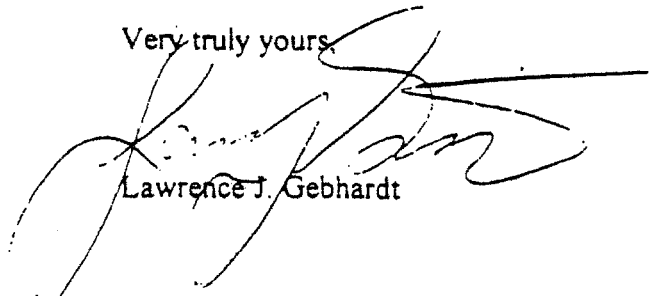
Revolving Line Of Credit

Principal	\$2,601,514.01
Interest through February 23, 2000	\$ 26,524.83
Total	<u>\$2,628,038.84</u>
Interest per day thereafter: \$596.18	

As previously stated, the Lender by this letter is demanding immediate payment in full of all sums due and owing to it by the Borrower under both loans. Unless full payment is made by the Borrower immediately upon receipt of this letter, all remedies available to the Lender under applicable law will be pursued without further notice to the Borrower, including the institution of judgment by confession and the enforcement of the Lender's security interest.

This letter is not intended to be a waiver of any rights, remedies, or recourse available to the Lender, nor an election of remedies arising as a result of the defaults or of any other default which may now or hereafter exist with respect to the revolving line of credit and the equipment line of credit. The collection of interest or acceptance of partial payments (that is, less than the total amount due in accordance with the terms of the debt instruments) by the Lender shall not constitute an extension of the maturity date of the revolving line of credit or equipment line of credit or a waiver of the Lender's acceleration of the indebtedness evidenced by the respective debt instruments or of any other rights under the loan documents.

Very truly yours,


Lawrence J. Gebhardt

LJG/dls

cc: Gerard L. Elias, SVP

- ALLFIRST BANK

Robert E. Chernicoff, Esquire

- CUNNINGHAM & CHERNICOFF, P.C.

Craig J. Schwartz

Page 1

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
 3 ALLFIRST BANK :
 4 Plaintiff :
 5 v. : CA NO. 1:CV-01-0786
 6 JOHN M. ORTENZIO :
 7 Defendant : Pages 1 - 216
 8 -----
 9
 10
 11
 12 Deposition of Craig J. Schwartz
 13 Baltimore, Maryland
 14 Friday, February 15, 2002
 15
 16
 17
 18
 19
 20
 21 Reported by: Kathleen R. Turk, RPR-RMR

Page 2

1
 2
 3
 4
 5 February 15, 2002
 6 10:17 a.m.
 7
 8 Deposition of Craig J. Schwartz held at the offices
 9 of:
 10
 11
 12 Blank, Rome, Comisky & McCauley, L.L.P.
 13 250 West Pratt Street
 14 Eleventh Floor
 15 Baltimore, MD 21201
 16
 17
 18 Pursuant to notice, before Kathleen R. Turk, RPR-RMR,
 19 a Notary Public of the State of Maryland.
 20
 21

Page 3

1 APPEARANCES:
 2
 3 Gebhardt & Smith, L.L.P.
 4 For the Plaintiff ALLFIRST BANK
 5 The World Trade Center
 6 401 East Pratt Street
 7 Ninth Floor
 8 Baltimore, MD 21202
 9 (410) 385-5100
 10 BY: Lawrence J. Gebhardt, Esq.
 11
 12 Blank, Rome, Comisky & McCauley, L.L.P.
 13 For the Defendant JOHN M. ORTENZIO
 14 One Logan Square
 15 Philadelphia, PA 19103-6998
 16 (215) 569-5641
 17 BY: Edward I. Swichar, Esq.
 18
 19 Also Present:
 20 John M. Ortenzio
 21

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Craig J. Schwartz

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1 A No.
 2 Q Personal matter?
 3 A Yes.
 4 Q Okay. Well, I'm going to ask you questions
 5 involving this case that we're here for, and if at any
 6 time you feel that you don't understand the question
 7 or it needs clarification, please let me know.
 8 Do not nod your head; you have to either say
 9 yes or no or something verbal so the Court Reporter
 10 can pick it up.
 11 If at any time you want to leave to go to
 12 the men's room or for any reason you want to take a
 13 break, just let me know, okay?
 14 A Yes.
 15 Q Thank you.
 16 Mr. Schwartz, would you be kind enough to
 17 tell me your educational background?
 18 A I have a Bachelor degree from Pennsylvania
 19 State University in Accounting.
 20 Q In Accounting.
 21 And when did you obtain that degree?

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1 Thereupon,
 2 CRAIG J. SCHWARTZ
 3 A Witness, called for oral examination by counsel for
 4 the Defendant, having been first duly sworn by the
 5 Notary Public, was examined and testified as follows:
 6 (Documents were premarked
 7 by counsel Schwartz
 8 Deposition Exhibit
 9 Nos. 1 - 14.)
 10 EXAMINATION BY COUNSEL FOR THE DEFENDANT
 11 BY MR. SWICHAR:
 12 Q Good morning, Mr. Schwartz. My name is Ed
 13 Swichar, attorney for the Defendant, John Ortenzio, in
 14 this lawsuit.
 15 We've never met. Have you ever been
 16 deposed?
 17 A Yes.
 18 Q Approximately how many times?
 19 A Once.
 20 Q Was that in connection with your being a
 21 loan officer for the bank?

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1 A 1980.
 2 Q Any subsequent degrees of any kind?
 3 A No.
 4 Q Okay. Did you attend any formal college
 5 courses subsequent to your B.S. degree?
 6 A No.
 7 Q Any banking-type seminars?
 8 A Yes.
 9 Q For example, what kind of seminars and how
 10 often did you attend in connection with your banking
 11 responsibilities?
 12 A We're constantly attending seminars as they
 13 relate to the -- all the aspects -- I shouldn't say
 14 that -- as it relates to our job as far as lending,
 15 credit, underwriting, documentation.
 16 Q Would you in bank parlance be called a
 17 lender?
 18 A Yes.
 19 Q That's your responsibility?
 20 A Yes.
 21 Q Okay. Starting with your current employment

Craig J. Schwartz

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1 background, could you describe for me by whom or what
 2 you are employed, your title, and your
 3 responsibilities, since -- from now going back to
 4 1980?
 5 A I've been at Allfirst Bank for eighteen and
 6 a half years.
 7 Q Can I stop you there?
 8 Allfirst Bank, as it was originally known as
 9 Dauphin Deposit?
 10 A And before that, Bank of Pennsylvania.
 11 Q Okay. And when did it become Allfirst Bank?
 12 MR. GEBHARDT: For the record, because
 13 the witness may be confused, it actually began as the
 14 First National Bank of Maryland, which was historical
 15 over the years, they converted to a state charter, and
 16 for a short period they were known as FNB Bank, and
 17 then it was changed to Allfirst Bank, all within that
 18 one-year period of time.
 19 So the witness --
 20 MR. SWICHAR: Okay.
 21 MR. GEBHARDT: That's why you may see

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1 on some documents First National, a Division of FNB
 2 Bank, or something like that.
 3 Q (By Mr. Swichar) You were an employee of all
 4 those entities, banking entities, that your attorney
 5 just mentioned?
 6 A Yes.
 7 Q Beginning in 19-when?
 8 A 1980.
 9 Q 1980.
 10 But your first job was with the -- this
 11 bank?
 12 A No, my first job was with a public
 13 accountant --
 14 Q Okay.
 15 A -- from 1980 until 1983.
 16 Q Okay. And then in 1983, where did you go to
 17 work?
 18 A Bank of Pennsylvania, which was a bank that
 19 Dauphin Deposit had purchased.
 20 Q Okay. Describe for me going forward your
 21 titles and banking responsibilities as a banker, as a

Page 11

1 lender.
 2 A Beginning when?
 3 Q Beginning with the first -- with your first
 4 job with the bank.
 5 A I was a credit analyst, reviewed financial
 6 statements, prepared loan writeups for commercial loan
 7 officers.
 8 The best I can recall, I did that for
 9 approximately three years.
 10 Then I was promoted and became the Manager
 11 of the Credit Department.
 12 Q What was the approximate year when that
 13 occurred? Approximately.
 14 What all did you do?
 15 A 1985?
 16 Q Okay. That was a question; the voice went
 17 up.
 18 A I was Credit Department Manager then for a
 19 year and a half to two years. Then I became a junior
 20 lender in the Small Business Lending Unit for another
 21 year. And after that, then, was into the commercial

Page 12

1 lending area, middle market lending.
 2 Q Is that what you are in now?
 3 A Yes.
 4 Q When did you go into the commercial middle
 5 market lending area?
 6 And by the way, that's as a Vice-President?
 7 A No, that was first as an Assistant
 8 Vice-President.
 9 Q Okay. When did you enter that area of
 10 banking?
 11 Approximately.
 12 A 1986, '87.
 13 Q Okay. When did you grow to be a
 14 Vice-President in that area?
 15 A I don't remember.
 16 Q Okay, but that's your current position?
 17 A Yes.
 18 Q What are your duties and responsibilities in
 19 that -- as Vice-President in that area?
 20 A To maintain my existing lending portfolio,
 21 generate new business for the bank, refer other

3 (Pages 9 to 12)

Craig J. Schwartz

Page 13

1 business to the bank, other areas of the bank.
 2 Q As part of your responsibilities, do you
 3 periodically evaluate your portfolio?
 4 A I don't understand what you mean.
 5 Q Well --
 6 A Do I --
 7 Q -- you indicated that your responsibility is
 8 basically to maintain and attract clients.
 9 A Yes.
 10 Q But with respect to your existing or new
 11 clients, do you have any other duties, such as
 12 evaluating the financial, your financial relationship
 13 with those clients to determine if the loans are still
 14 viable, to evaluate clients to determine if new loans
 15 should be made if requested by your clients?
 16 A Okay. First, we do review financial
 17 information on our clients as it is requested by the
 18 bank or agreed to in any loans that may be outstanding
 19 by the customer at the time.
 20 The terms and conditions of the loan
 21 determine, determine that.

Page 14

1 Q Is there a procedures manual that guides you
 2 as to when and how and how often to evaluate a
 3 particular loan portfolio?
 4 A Not that I'm aware of.
 5 Q Okay. Is that within your discretion, then?
 6 A No, not in my discretion. It's part of the
 7 review, part of the review process of each loan that
 8 we have on the books or what is the -- under what
 9 conditions each loan was approved and are we to review
 10 these financial statements on a periodic basis.
 11 Q What guides you in determining whether or
 12 not there should be a review or a periodic review or
 13 an interim review?
 14 A The credit approval process of the bank.
 15 Q What is that?
 16 I don't understand.
 17 Assume that a loan has already been
 18 approved. What determines in your discretion how
 19 often or how you should evaluate that particular loan
 20 relationship?
 21 A On loans that as part of the credit approval

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1 process determine that the loans are to be reviewed on
 2 a periodic basis as far as when financial statements
 3 are provided, are to be provided to the bank by the
 4 customer, that's how often those get, get reviewed.
 5 Q How is that determined?
 6 A Those in charge of approving the loan
 7 usually determine how often that we want to receive
 8 financial information.
 9 Q Is that you?
 10 A No.
 11 Q You don't approve the loan?
 12 A I have no lending authority.
 13 Q Okay. Who has the -- let's say in 1999 and
 14 in 2000, 2001 -- who had the lending authority with
 15 whom you would be related?
 16 A Depending -- how much would the loan be?
 17 It varied depending on how much the, the
 18 loan would be to a customer.
 19 Q Someone above you would determine how often
 20 to evaluate a loan or review a loan relationship?
 21 A Yes.

Page 16

1 Q And that would be a person who had the
 2 initial lending authority?
 3 A Yes.
 4 Q Now, even though you didn't have the lending
 5 authority, you basically were the point man, the
 6 relationship officer, with the customer?
 7 A Yes.
 8 Q Okay. Did you have any input at all in the
 9 loan approval process?
 10 A What do you mean by input?
 11 Q Was your input requested by those who had
 12 the authority?
 13 A I prepared what would be the approval -- I
 14 would start the approval process from the customer and
 15 gather up the information required for them to approve
 16 the loan.
 17 That would be my input.
 18 Q You described yourself as a middle market
 19 lender.
 20 What is a middle market lender?
 21 A Middle market is the way the bank clarifies,

4 (Pages 13 to 16)

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1 classifies how much, what type of customers I am
2 supposed to be lending to or trying to attract to the
3 bank determined by sales volume of the customer and
4 also by the amount of money to be borrowed by the
5 customer.

6 Q Are there parameters?

7 A Not in writing; just ball park numbers that
8 have been determined.

9 Q What would be ball park numbers?

10 Are they ball park numbers related to a
11 borrower's revenues, or a borrower's loans to be, or
12 something else?

13 A A little of both.

14 Q If someone came to you with a certain
15 request for a certain number, would it have to fall
16 within your authority, or would you refer it somewhere
17 else?

18 In other words, I'm just trying to figure
19 out --

20 A If it fell within my authority that I'm
21 supposed to be doing, I would end up keeping that.

Page 18

1 Otherwise, I would have referred it out.

2 Q Excuse me, let me go through the back door.
3 CCI Construction was a middle market
4 borrower?

5 A Yes.

6 Q What made it a middle market borrower?

7 A Their revenue level and the amount of loans
8 that they had on the books.

9 Q What was that revenue level?

10 A Well, it was, it was -- it would be less
11 than a hundred and fifty million dollars.

12 Q Per year?

13 A Yeah.

14 Q Okay. And how about a loan on the books?

15 A Well, anything less than about thirty
16 million dollars would fall into the middle market
17 area.

18 Q Okay. Going back to 1999, 2000, tell me
19 your business relationship with Michael Zarcone.

20 A I really don't -- I don't recall what
21 Michael's title was at that time.

Page 19

1 He would have -- I think he would have been
2 my boss' boss; senior, senior lender in
3 Pennsylvania -- senior commercial loan -- senior
4 commercial lender in Pennsylvania.

5 Q All right, let's go back.

6 Who was your boss?

7 A Daryl Myers.

8 Q Okay. Did Daryl Myers have authority to
9 make loans?

10 A Up to a dollar limit, yes.

11 Q What was that dollar limit?

12 A I don't recall.

13 I believe -- no, I, I don't know. I would
14 have to guess.

15 Q Okay. So Daryl Myers was your immediate
16 boss?

17 A Yes.

18 Q Would you have daily contact with him?

19 A Yes.

20 Q Okay. For what purpose would you have daily
21 contact with him?

Page 20

1 A Normal day-to-day operations.

2 Q Okay. How about Michael Zarcone?

3 He was above Daryl Myers?

4 A Yes.

5 Q How did his job responsibilities differ from
6 Daryl Myers?

7 I mean, why would Daryl Myers go to Michael
8 Zarcone, is another way of asking?

9 A Daryl would not have sufficient lending
10 authority.

11 Daryl would report to Michael on what's
12 going on in the, the bank's area or in the unit that
13 he's in charge of.

14 Q How about Jim Trout?

15 A Jim Trout was a credit officer at that time.
16 He -- his main focus was to, to -- for credit
17 approval, approval of credits.

18 Q Was he above or below you -- I'm not clear
19 on that -- or equal?

20 A I did not report to him. I had to go to him
21 for credit approval.

5 (Pages 17 to 20)

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1 The credit area is separate from the lending
2 function.

3 Q Explain to me the difference.

4 A Jim Trout as part of the credit area had no
5 sales focus for the bank, was strictly credit,
6 approving, reviewing credit.

7 Q When you say reviewing credit, is that
8 different than reviewing whether loans should be
9 granted, or is that the same thing?

10 A That's the same thing.

11 Q Okay. Is he a numbers cruncher?

12 A No, no.

13 Q Well, it's not clear to me what he did for a
14 living, or does.

15 A The writeup, the loan fact sheet, the
16 spreadsheets of the financial statements of customers
17 that are packaged together, he receives that package
18 from me to review and makes a decision as far as
19 granting or not granting any loans.

20 Q And how does that differ from Mr. Zarcone or
21 Mr. Myers?

Page 23

1 Q Mr. Zarcone is not with the bank?

2 A Correct.

3 Q What were the circumstances of his leaving?

4 A I have no idea.

5 Q You don't know if he was asked to leave?

6 A I have no idea.

7 Q Mr. Gibson; what was your relationship with
8 Mr. Gibson in 1999, 2000?

9 A Jamin?

10 Q Yes.

11 When would you involve yourself with him?

12 A When there is a problem situation with a
13 loan.

14 Q And Mr. Gibson --

15 MR. GEBHARDT: Just for clarification,
16 are you talking when he would involve himself in 1999,
17 or when would he involve himself today?

18 I think there's a difference.

19 Q Well, the question was 1999 and 2000.

20 If there's a difference between 1999 and
21 2000, let me know.

Page 22

1 Let me strike that, okay? Let's get to the
2 heart of this.

3 If I came to you in 1999 and had the
4 greatest financials in the world and I wanted to
5 borrow from the bank -- I came to you personally -- a
6 million dollars. What would be the process?

7 A I would prepare what I'd need to present the
8 loan. I would give it to my boss for his review.

9 Q Your boss being Mr. Myers?

10 A Correct.

11 Q Okay.

12 A If the loan was above his authority, he
13 could then go to Mr. Trout and/or Mr. Zarcone for
14 approval of that loan.

15 Q That's it?

16 A It could go -- could have gone higher than
17 that, to Mr. Shannon.

18 That's -- in real basic, that's what
19 happens.

20 Q Okay. Mr. Myers is still at the bank?

21 A Yes.

Page 24

1 MR. GEBHARDT: Not to beat around the
2 bush, Mr. Gibson had a different job --

3 MR. SWICHAR: I appreciate that.

4 MR. GEBHARDT: He had a different job.

5 MR. SWICHAR: I understand that -- I
6 knew that, actually.

7 MR. GEBHARDT: Okay.

8 Q (By Mr. Swichar) In the year 2000, beginning
9 with January 1, 2000, Mr. Gibson worked in the
10 Baltimore office of the bank?

11 A No, he worked in Harrisburg.

12 Q He worked in Harrisburg, all right.

13 What would be your relationship -- what was
14 his job in relation to your job?

15 A His job is special credits that repayment of
16 bank -- of the loans made to customers may be
17 questionable. We would get him involved and his
18 expertise on the situation.

19 Q In early 2000, was he in what bankers would
20 call workout?

21 A Yes.

6 (Pages 21 to 24)

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1 Q Okay. Workout really means either work out
2 or do what you got to do to call the loan, right?
3 But they call it workout, work out the
4 bank's problem?
5 A Yes.
6 Q Okay. How about Mr. Gerard Elias?
7 What was your business relationship with him
8 in, let's say as of January 1, 2000?
9 A Well, he was Jamin's boss.
10 Q Where -- was he in Harrisburg?
11 A No, he's in Baltimore.
12 Q He's in Baltimore?
13 A Yes.
14 Q And what did he do for a living?
15 A He was the manager of the workout area of
16 the bank.
17 I believe he would get called in when -- at
18 Jamin's request, not my request.
19 Q Okay. Let's now talk about CCI
20 Construction.
21 That was your borrower, so to speak?

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1 A Yes.
2 Q When did CCI Construction come to you and
3 become your -- develop its relationship with the bank?
4 Do you recall? If you don't, why don't I
5 just see if I can help you, perhaps.
6 I'm going to show you what has been marked
7 for identification as Exhibit S-1, or Schwartz 1. I
8 don't know if I spelled your name right on there; if I
9 didn't, I apologize.
10 A Looks correct.
11 Q Good.
12 In going through the records that were
13 furnished to me, Mr. Schwartz, this appears to be the
14 first note or loan transaction that CCI had with the
15 bank, then Dauphin Deposit Bank.
16 Does this refresh your recollection, or is
17 my presumption inaccurate?
18 A I don't recall this.
19 CCI was a customer of the bank before I
20 became its relationship manager, loan officer.
21 Q Okay. What was the relationship when you

Page 27

1 developed your relationship or had a relationship with
2 CCI Construction?
3 What year was that?
4 A I don't recall when that was.
5 Q Do you recall what the credit relationship
6 was, the loan relationship, the amount that was owed,
7 any notes outstanding, when the bank came to -- when
8 Mr. Ortenzio and CCI came to you as a borrower?
9 A They were a customer of the bank, and I
10 don't recall the circumstance why --
11 Q What did you inherit?
12 A -- when they became that.
13 Q What did you inherit is another way of
14 asking the question.
15 A I don't recall.
16 Q No recollection at all?
17 A No.
18 Q It wasn't originally four million dollars,
19 was it?
20 A I don't recall.
21 Q Okay.

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1 MR. SWICHAR: Well, I want the record
2 to reflect, with Mr. Gebhardt here, that the earliest
3 relationship document I have is S-1. If there is
4 anything earlier, I would appreciate receiving it.
5 We can do that at lunch.
6 MR. GEBHARDT: You've got the same
7 problem as we have.
8 MR. SWICHAR: I know, because I think
9 this is the earliest one I could find.
10 MR. GEBHARDT: There was something
11 referring to -- in '92 -- saying they had been a
12 customer since 1990, a letter of recommendation,
13 but --
14 MR. SWICHAR: Okay. This is at least
15 one of the earliest, we can agree to that?
16 MR. GEBHARDT: Yeah.
17 Q (By Mr. Swichar) I'm going to show you a
18 copy of the Complaint that's been filed in this
19 lawsuit, and I'll be referring to the various exhibits
20 that were attached, Mr. Schwartz.
21 And if you turn to Exhibit A, there is a

7 (Pages 25 to 28)

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1 four million dollar promissory note, apparently signed
2 by CCI in favor of the bank.

3 Do you recall this note? And this note is
4 dated March 24, 1999.

5 A Yes.

6 Q Okay. Were you involved in the process that
7 led to this note?

8 A Yes.

9 Q Can you explain to me how this note came
10 about?

11 Did someone come into the bank and ask you
12 for it, more money, or what? What's your
13 recollection?

14 A It would appear that as a result of Dauphin
15 Deposit and the merger between First National Bank of
16 Maryland came about, this FILM Cash Solutions
17 Promissory Note, was a replacement document for a
18 loan -- for a line of credit note that was previously
19 issued by Dauphin Deposit.

20 Q Let me stop you there.

21 Was it in the same amount or a lesser

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1 forward, in contrast to a short-term?

2 A Well, these lines of credit are only
3 approved for a year at a time, so every year it has to
4 be renewed.

5 Q Umh-humh.

6 And had it been renewed in prior years?

7 A I believe so.

8 Q If I told you that the four million dollar
9 note of March 24, 1999, was the eventual outgrowth of
10 the six hundred thousand dollar note of S-1 that goes
11 back to 1992, would that refresh your recollection?

12 A No, but that seems reasonable.

13 Q So this was a long-term relationship?

14 A Since 1992.

15 Q At least?

16 A At least.

17 Q Okay. And the four million dollar note was
18 a note that in some form, in some amount, continued to
19 grow and be renewed as of -- at least beginning in
20 1992 through March, 1999?

21 I'm just trying to establish --

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1 amount?

2 A That, I don't recall.

3 Q Okay. This was a substitute note?

4 A Yes.

5 Q But you do not recall if this was the result
6 of a request for increased credit facility?

7 A Not just by looking at the note, I can't
8 determine that.

9 Q Okay. Well, we'll show you some more
10 documents later, but let's keep that in the back of
11 our minds.

12 This is an unsecured note, Exhibit A of the
13 Complaint?

14 A Yes.

15 Q Do you recall any of the approval process in
16 connection with this note off the top of your head?

17 A No, I don't.

18 Q Was this considered part of a long-term loan
19 between the bank and CCI?

20 This was part of a long existing --

21 preexisting relationship that was intended to go

Page 32

1 A Apparently.

2 Q Okay. Now, to further refresh your
3 recollection, it's my understanding that in 1999, at
4 least, CCI had two accounts at the bank, a checking
5 account and a payroll account; is that correct?

6 A It sounds correct.

7 Q And there was also something called a cash
8 management facility; is that correct?

9 A Yes.

10 Q And where would CCI's revenues or business
11 deposits be deposited?

12 In the checking account?

13 A Yes.

14 Q Okay. Now, if you look at that Complaint,
15 if you turn to Paragraph 7 -- and just take a moment
16 and read it to refresh your recollection, and then I'm
17 going to ask for some clarifications.

18 (Witness reading.)

19 A Okay.

20 Q Now, this describes correctly the
21 relationship or the procedural relationship between

8 (Pages 29 to 32)

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1 the checking and the payroll account on one side and
 2 the cash management facility on the other; is that
 3 right?
 4 Am I putting it the right way?
 5 A I didn't --
 6 MR. GEBHARDT: Objection.
 7 Q Does this accurately describe the way the
 8 cash management facility worked?
 9 A Yes.
 10 Q Okay. Is my understanding correct that
 11 CCI's deposits would be deposited in the checking
 12 account first? Is that right?
 13 A Yes.
 14 Q Okay. And each day, the bank would then
 15 draw from the line of credit to pay any negative
 16 balance on the checking account; is that correct?
 17 A Yes.
 18 Q All right. How -- when would that occur?
 19 How often would that occur?
 20 A I believe that occurs once a day.
 21 Q Okay. What time of the day does that occur?

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1 A I believe it's after bank hours, banking
 2 hours.
 3 Q So the bank after hours, daily, would draw
 4 from the line of credit to cover any checks that were
 5 written by CCI that day?
 6 A For any checks that were presented for
 7 payment on CCI's behalf that day.
 8 Q That's correct. That's a much better way of
 9 saying it.
 10 Now, the bank conversely, if you will, would
 11 on a daily basis sweep from the checking account any
 12 business deposits and apply it as a credit to pay down
 13 the four million dollar line of credit; is that
 14 correct?
 15 A Yes.
 16 Q Okay. And that would occur on a daily
 17 basis?
 18 A Yes.
 19 Q And that would occur after hours?
 20 A Yes.
 21 Q Okay. And would you review that process

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1 daily to determine --
 2 A No.
 3 Q How often would you review that process to
 4 determine basically what's been drawn down and what's
 5 been swept?
 6 Let me ask you first, is that your
 7 responsibility?
 8 A No.
 9 Q Who -- whose responsibility was that?
 10 A I don't know whose responsibility that is.
 11 Q Well, would someone at the bank -- maybe you
 12 can't identify them, but would someone at the bank
 13 have a responsibility to review on any periodic basis
 14 the activity in the cash management facility relating
 15 to CCI?
 16 A I don't understand the question.
 17 Q There's activity relating to the cash
 18 management facility on a daily basis, we've
 19 established that.
 20 A Yes.
 21 Q Did anyone at the bank monitor that to

Page 36

1 determine, for example, the draws on the line and the
 2 credits against the line of credit -- against the
 3 line?
 4 A Not on any predetermined schedule.
 5 Q Well, my question is did anyone do it, first
 6 of all.
 7 My next question is going to be who would
 8 have done that, what department, and would you have
 9 ever done that.
 10 That's a three-part question, there's an
 11 objection, so I'll take it apart.
 12 Would you -- do you know anyone at the bank
 13 who would periodically on some schedule, sporadic or
 14 otherwise, review the activity of CCI's cash
 15 management facility?
 16 A Yes.
 17 Q And who or from what department at the bank
 18 would do that?
 19 A It could be from the Cash Management
 20 Department to the Deposit Operations, to the Credit
 21 Department, and possibly even myself if the need would

9 (Pages 33 to 36)

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1 arise.

2 Q You said there's a Cash Management
3 Department.

4 Is it their responsibility to review cash
5 management activity for the accounts?

6 A They are the ones that put the transactions
7 through on a daily basis, so if that's considered
8 review, then that's what their job is.

9 Q Well, for example, would someone sit at a
10 computer desk and review the activity?

11 A No. I think the computer does it
12 automatically. They -- as far as checks being
13 presented for payment and any draws off the line
14 happens automatically.

15 Q But would anybody review what the computer
16 did automatically; look at a screen and say, this is
17 what the computer did?

18 I'm trying to figure out, Mr. Schwartz, and
19 I'm not trying to trick you or be cute, but you have
20 major transactions going in and out of the cash
21 management facility. Somebody at the bank -- correct

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1 A I would be prompted to look at it at a
2 request of the borrower to take a look if there was a
3 problem. If somebody in the bank indicated there was
4 a problem, I would review it.

5 Other than that, I wouldn't review it,
6 unless there would be a problem -- a problem would
7 be -- would come up.

8 Q So even though CCI is your borrower, so to
9 speak, you would not review periodically the activity
10 to determine what's happening with the cash management
11 facility, what's happening with the four million
12 dollar line of credit?

13 A That's correct.

14 Q And no one at the bank would unless there's
15 a problem?

16 A That, I don't know who else would review it.

17 Q Is there any procedures manual at the bank
18 that predetermines who reviews activity in a cash
19 management facility and/or how often?

20 A I don't know.

21 Q Does the bank have a procedures manual?

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1 me if I'm wrong -- had to be reviewing that -- like,
2 for example, suppose CCI went over the four million
3 dollar line of credit; someone had to be reviewing
4 this.

5 Am I right?

6 A If that occurs, a flag comes up, and it --
7 the checks that are there that would have put it over
8 the four million dollar line of credit would come up
9 as NSF on our system.

10 Q Is that the only time somebody would review
11 it?

12 A No.

13 Q When would someone review the daily
14 activity, or the activity in the cash management
15 facility on a periodic basis, whatever that basis may
16 be?

17 A When the loan's coming up for review, our
18 Credit Department may look at that.

19 Q When would you look at it?

20 What would prompt you to look at it, and how
21 often would you look at it?

Page 40

1 A I don't know.

2 Q You've never looked at one if there is one?

3 A That's correct.

4 Q You don't recall ever seeing one?

5 A Yes.

6 Q There's no book of guidelines on when you
7 could, for example, make a loan, when you can call a
8 loan, when you -- what you should do about guarantees,
9 et cetera, et cetera?

10 There's no book that provides guidelines for
11 that to lenders?

12 A A book of guidelines? A policy manual?

13 Q Well, I don't know what your bank calls it
14 because I've never been there, never had the
15 opportunity to review it.

16 Is there a policy manual -- tell me what,
17 what manuals you have on your desk or utilize in
18 relation to your job. Let's put it that way.

19 A Well, right now, everything's in the
20 computer. I don't have any manuals.

21 Q Well, how about in 1999 and 2000?

10 (Pages 37 to 40)

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1 Was everything in the computer, or did you
 2 have manuals?
 3 A I don't recall at that point if we had
 4 manuals or it was all on the computer.
 5 Q Do you have any old manuals laying around?
 6 A Not anymore I don't.
 7 Q You tossed them?
 8 A I was told to give them back, and somebody
 9 got rid of them.
 10 Q When was that?
 11 A When Allfirst took over.
 12 Q Okay. They told you to get rid of them?
 13 A We were to resubmit them.
 14 Q And were new ones ever provided?
 15 A Everything was on the computer.
 16 Q Okay. What is on the computer that would
 17 help me as a lender determine when and what guidelines
 18 to follow in the making of a loan?
 19 A Would you restate that? Ask --
 20 MR. SWICHAR: Would you read that back,
 21 please?

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1 (Question was read by the Reporter.)
 2 A What kind of loan?
 3 Q (By Mr. Swichar) A loan that would have gone
 4 to CCI.
 5 A I don't recall there's any specific policy
 6 to lending to CCI and the business they were in as a
 7 general contractor.
 8 Q Not as a general contractor, but -- I don't
 9 want to limit it to that, please understand.
 10 Is there anything on your computer that
 11 provides guidelines or procedures for the granting of
 12 a loan to a company of the size of CCI or of a loan of
 13 the size made to CCI?
 14 Any guidelines or procedures?
 15 A I don't specifically recall.
 16 Q Well, if someone came into the bank in 1999
 17 or 2000 and wanted a loan, four million dollar line of
 18 credit, commercial, is there anything on the computer
 19 that you would look at to guide you?
 20 A No.
 21 Q Why do you say no?

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1 A I've had experience doing this, and those
 2 that are going to end up approving the loan have
 3 experience doing that.
 4 Q Assuming you didn't have experience, is
 5 there anything on your computer that you would be able
 6 to look at to guide you?
 7 A I don't know. It's been quite some time
 8 that I've taken a look at that.
 9 Q Okay.
 10 MR. SWICHAR: Well, if there are any
 11 loan guidelines that are computerized, I'm making a
 12 request for them.
 13 MR. GEBHARDT: I don't know that such,
 14 such a thing exists. I strongly doubt it.
 15 And, you know, we've produced what
 16 we're going to produce.
 17 MR. SWICHAR: I don't know what that
 18 means, but I would frankly be shocked if there are no
 19 either computerized or -- documents or a manual which
 20 would provide procedures and guidelines to a loan
 21 officer for the granting of loans.

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1 I would, frankly, be shocked, but maybe
 2 not with this bank, perhaps.
 3 Q (By Mr. Swichar) Are there any guidelines or
 4 procedures either in a manual or on the computer that
 5 deal with the process of a cash management facility?
 6 A I don't know.
 7 MR. SWICHAR: I'm making the same
 8 request, if there are any manuals or computerized
 9 documents that provide guidelines or procedures
 10 dealing with a cash management facility.
 11 MR. GEBHARDT: And I have the same
 12 response.
 13 And I think this is something that's
 14 already been taken up with the judge and ruled upon,
 15 and our response is as it was before, we complied with
 16 the Court Order.
 17 MR. SWICHAR: And I'm making a new
 18 request.
 19 Are you refusing to produce them?
 20 MR. GEBHARDT: I am, basically, if
 21 that's what you would like to interpret, yes.

11 (Pages 41 to 44)

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1 MR. SWICHAR: I'm not interpreting it.
 2 I'm taking it as a no because you're saying --
 3 MR. GEBHARDT: Taking it as --
 4 MR. SWICHAR: I've made a new request.
 5 MR. GEBHARDT: Well --
 6 MR. SWICHAR: And the answer is you're
 7 not going to produce them because it's not in the
 8 Court Order.
 9 MR. GEBHARDT: Exactly.
 10 MR. SWICHAR: Okay. We'll take that up
 11 with the judge, too.
 12 Q (By Mr. Swichar) Does the bank have any
 13 manuals or computerized records that deal with the
 14 procedures and guidelines for providing multiple loans
 15 or multiple facilities to the same borrower?
 16 A Not that I'm aware of.
 17 Q Is it possible they're in the computer?
 18 A I highly doubt that.
 19 MR. SWICHAR: I'm going to ask again
 20 for the bank to look into that, and if there are any
 21 such computerized records or manuals, I'm requesting

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1 it.
 2 And I understand you're providing the
 3 same answer, which is a negative.
 4 Q (By Mr. Swichar) Does the bank have any
 5 computerized records or manuals which deal with
 6 obtaining or requesting guarantees from borrowers?
 7 A Not that I'm aware of.
 8 MR. SWICHAR: Same request; same
 9 negative response.
 10 Q (By Mr. Swichar) Does the bank have any
 11 computerized records or manuals that provide
 12 guidelines or procedures that deal with the
 13 declaration of defaults on loans?
 14 A Not that I'm aware of.
 15 MR. SWICHAR: Same request; same
 16 negative response.
 17 Q (By Mr. Swichar) Does the bank have any
 18 computerized guidelines or manuals that deal with the
 19 bank's freezing of bank accounts, such as checking
 20 accounts and/or bouncing checks or dishonoring checks?
 21 A Not that I'm aware of.

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1 MR. SWICHAR: Same request.
 2 Mr. Gebhardt, let me make it clear that
 3 I would at least like to know before we go to the
 4 judge if these documents or computerized or otherwise
 5 exist. If, obviously, they don't exist, there would
 6 be no reason to go to the judge. But if you are
 7 refusing in the first place to not even check out to
 8 see if this exists, then I'd like to know that.
 9 MR. GEBHARDT: Well, first of all, such
 10 documents were not requested by the Defendant in this
 11 document production request.
 12 Thereafter, there was a request for
 13 such materials that formulated itself in a production
 14 of the credit policy manual of Allfirst, which is a
 15 computerized, extensive, proprietary, and confidential
 16 document that does exist.
 17 And we took that request to
 18 Judge Rambo, we argued what would or would not be
 19 produced, and Judge Rambo gave a ruling, and we are
 20 living by that ruling.
 21 We have given you everything that that

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1 ruling requires us to give, and that's it.
 2 Now, if you're asking me -- and I've
 3 represented the bank for twenty-five years -- is there
 4 a book that says call a default if this, this, and
 5 that occurs, offset a line of credit if this occurs, I
 6 have never heard of such a thing, and I'm not simply
 7 going to go through a scouring of an eighteen billion
 8 dollar institution to see if there is any such
 9 unrelated material.
 10 MR. SWICHAR: Well, point one, you
 11 mentioned there is a computerized loan policy.
 12 MR. GEBHARDT: Loan policy manual.
 13 MR. SWICHAR: Loan policy manual.
 14 And if, in fact, it deals with any of
 15 the areas that I am now requesting anew, for the first
 16 time, would you provide -- would you let me know?
 17 MR. GEBHARDT: You have -- that was
 18 asked and that was argued in front of Judge Rambo.
 19 MR. SWICHAR: Your answer is no?
 20 MR. GEBHARDT: My answer is it has been
 21 ruled upon by the Court, and I'm not going to waive

12 (Pages 45 to 48)

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1 the benefit of, or assume obligations beyond what that
2 ruling was.

3 MR. SWICHAR: I understand.

4 So your answer is no.

5 Would you also refuse to provide me an
6 index to that computerized manual so that I can
7 determine for myself what areas or what chapters might
8 be relevant in this case?

9 All subject to an appropriate
10 confidentiality agreement.

11 MR. GEBHARDT: I am not producing
12 anything beyond what Judge Rambo's ruling required the
13 bank to produce after argument on a discovery dispute.

14 Q (By Mr. Swichar) Mr. Schwartz, let's go back
15 to you.

16 Is there --

17 MR. GEBHARDT: Also enhanced by the
18 irrelevancy as to any subject matter -- excuse me --
19 as to any claim or defense in this case, which is what
20 we argued in front of Judge Rambo, and certainly
21 applies to the request that you have right now.

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1 Q Mr. Schwartz, are there any computerized
2 records or a manual that would cover a situation where
3 a bank finances accounts receivable and/or work in
4 progress of a borrower?

5 A Not that I'm aware of.

6 Q Okay.

7 MR. SWICHAR: Same request; same
8 denial, I assume.

9 Q (By Mr. Swichar) Would you take a look at
10 the four million dollar note, Exhibit A?

11 Exhibit A, the four million dollar note, is
12 a bank form; is that correct?

13 A Yes.

14 Q Do you know how the changes reflected by
15 scratchouts and initials, et cetera, came about?

16 MR. GEBHARDT: Note an objection for
17 the record because I don't know that the scratchouts
18 reflect changes. They reflect markings put on the --

19 MR. SWICHAR: They're changes to the
20 document.

21 MR. GEBHARDT: There are markings on

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1 the document.

2 There's an issue whether those markings
3 do or do not change anything in the document.

4 Q (By Mr. Swichar) For example, Mr. Schwartz,
5 Paragraph 9 is stricken, Paragraph 11 has various
6 strikeouts that are stricken and initialed in the
7 margin.

8 Do you have any idea how those items came
9 about?

10 A It appears as if Sheri Phillips, who worked
11 for CCI, scratched those out -- made the changes.

12 Q Did someone at the bank approve those
13 changes?

14 A There's no acknowledgment along with her
15 initials.

16 Q Do you have a -- would you have been
17 involved?

18 Do you recall meeting with Sheri Phillips
19 and discussing those changes or seeing those changes
20 come about?

21 A I don't recall.

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1 Q You have no recollection as to how those
2 items came about?

3 A Not specifically.

4 Q Okay. Is it fair to say that the four
5 million dollar note, Exhibit A, was signed by the bank
6 with the changes noted?

7 MR. GEBHARDT: Objection.

8 There's no signature of the bank on
9 this document.

10 Q Is there a four million dollar note signed
11 by the -- approved by the -- is this the four million
12 dollar note approved by the bank?

13 A This is --

14 MR. GEBHARDT: Object to the word
15 approved.

16 A Am I to answer?

17 Q Go ahead.

18 A This is a result of the approval of the bank
19 of the four million dollar line of credit.

20 Q So the bank, therefore, approved this note
21 in the form attached as Exhibit A to the Complaint?

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1 A I wouldn't agree to that.
 2 Q Why not?
 3 A There's no acknowledgment by anybody from
 4 the bank on this note of any of the changes.
 5 Q Okay. So you're saying that the changes on
 6 Exhibit A were not approved by the bank?
 7 A Yes.
 8 Q Were you -- but you were not involved in
 9 seeing the scratchouts or any discussions being made
 10 when --
 11 A Not to my recollection.
 12 Q -- the note was executed?
 13 A Not to my recollection.
 14 Q What is your recollection about this
 15 particular note, the four million dollar note?
 16 Do you remember someone coming from CCI and
 17 signing it?
 18 As the point man, the relationship officer,
 19 wasn't it in your possession when it was signed?
 20 A I don't recall.
 21 Q You don't recall any circumstances of the

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1 signing of this note?
 2 A No, I don't.
 3 Q The granting of a four million dollar loan
 4 facility in 1999, you have no recollection of that?
 5 MR. GEBHARDT: Objection.
 6 Q I'll reword the question.
 7 The granting of a four million dollar loan
 8 facility in 1999 by way of this note and the signing
 9 of this note, you have no recollection of the
 10 circumstances of the signing of this note?
 11 A I have no recollection of the signing of
 12 this note.
 13 Q Or the circumstances of the note?
 14 A Define circumstances.
 15 Q Someone sitting down and signing it.
 16 A I do not recall if I was present or not when
 17 this note was signed.
 18 Q Okay. Let's go to the 1.2 million dollar
 19 note, which is Exhibit B of the Complaint, the
 20 Complaint being Exhibit Schwartz 2.
 21 Can you -- do you have a recollection -- I

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1 realize it was a few years ago -- do you have a
 2 recollection how that note came about?
 3 A Yes.
 4 Q Tell me, please.
 5 A What would you like to know?
 6 Q I'd like to know how it came about.
 7 Did someone come to you and ask for more
 8 money? Did it fly out of the sky? What happened?
 9 A This is the result of an approval from a
 10 request from CCI for a million two.
 11 Q Who requested it?
 12 What were the circumstances?
 13 Did someone come into your office and say I
 14 need money, here's what I need and here's why I need
 15 it and here's my financials, or did someone just call
 16 and say I need 1.2 and you mailed them this note?
 17 What happened?
 18 MR. GEBHARDT: Objection to form.
 19 Q You know what I'm talking about,
 20 Mr. Schwartz.
 21 A One question at a time and I'll answer it.

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1 Q Well, I'm trying to give you examples of the
 2 information I'm looking for.
 3 How did this note come about?
 4 A There was a request made from CCI of
 5 additional funds.
 6 Q By whom?
 7 A Either Sheri Phillips or Mr. Ortenzio.
 8 Q Do you recall specifically which person?
 9 A No, specifically.
 10 Q And do you recall either of those persons
 11 telling you why they required the 1.2 million
 12 dollar --
 13 A Yes.
 14 Q -- advance or facility?
 15 What did that person tell you?
 16 A There was a current cash flow shortage of
 17 the company, and additional funds were required to
 18 continue operation.
 19 Q You don't remember who told you that?
 20 A I believe it was in a meeting, and
 21 Mr. Ortenzio and Sheri Phillips were both there.

14 (Pages 53 to 56)

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1 Q Was there any discussion whether this was
2 going to be a short-term or a long-term facility?
3 A Short-term, I believe.
4 Q What is short-term in relation to long-term?
5 Make sure we're on the same wavelength.
6 A Short-term would be less than a year.
7 Q Okay. Were any documents presented to you
8 by CCI in connection with your granting the 1.2
9 million dollar loan facility?
10 A Yes, I believe they were.
11 Q What documents were provided to you and
12 relied upon?
13 A I don't specifically recall exactly what
14 documents were, were given.
15 Q No -- no general idea as to what documents
16 were provided?
17 A Financial statements, current financial
18 statements of the customer.
19 There may have been others.
20 Q Do you recall that, or are you just assuming
21 it?

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1 A I can recall that, financial statements.
2 Q Anything else?
3 A No.
4 Q Okay. Is the 1.2 million dollar note a bank
5 form?
6 A Yes.
7 Q You'll notice that there are, again, some
8 certain strikeouts, for example, at the bottom of the
9 first page, and there are some inserts in the first
10 and third paragraphs of Page 2.
11 Do you recall how they came about, sir?
12 A There was some question by Mr. Ortenzio
13 that -- apparently, he didn't like the language in the
14 notes.
15 Q And who approved the changes?
16 A I did.
17 Q You did?
18 A Yes.
19 Q Did you need authority of anyone?
20 A I should have had authority, yes.
21 Q Okay. Why don't you look at Schwartz 3 --

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1 I'm sorry -- Schwartz, Schwartz 4 -- I just have a
2 question on Schwartz 3.
3 Let me show you Schwartz 3. Let me know
4 when you are finished looking at it.
5 (Witness reading.)
6 Q I have a very simple question, Mr. Schwartz.
7 If you want to read the whole thing, feel free to.
8 (Witness reading.)
9 A Okay.
10 Q Based on the documents that have been
11 produced, that have been produced by the bank,
12 Schwartz 3 appears to be the latest cash management
13 agreement that was signed by CCI.
14 Do you have any reason to state otherwise?
15 MR. GEBHARDT: Objection.
16 I think that misstates the record. If
17 you look at the note that's in the Complaint on
18 Exhibit -- which is Exhibit A to the Complaint, you'll
19 see a description of the cash management system in
20 effect with that, and that's six years, or five years
21 after this note.

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1 MR. SWICHAR: Okay.
2 Q (By Mr. Swichar) This, then, appears to be
3 the original cash management note, except this may be
4 modified or superseded by anything in any of the notes
5 signed by CCI; is that correct?
6 MR. SWICHAR: I appreciate your
7 correction.
8 A Yes.
9 Q (By Mr. Swichar) Okay. I show you what's
10 been marked for identification as Exhibit Schwartz 4.
11 Take a minute and look at it.
12 (Witness reading.)
13 A Okay.
14 Q Now, according to the last page, this --
15 this Exhibit S-4 reflects that the 1.2 million dollar
16 note was approved not only by you but by
17 Messrs. Myers and Zarcone; is that correct?
18 A That's correct.
19 Q So you did have some approval authority
20 along with the others?
21 A No, I signed this because I have to.

15 (Pages 57 to 60)

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1 Q Okay, but you -- but you were not involved
2 in the approval, then? You couldn't have been?

3 A I did not have the authority to say yes or
4 no.

5 This could have been approved without my
6 signature.

7 Q Okay. Now, with respect to the 1.2 million
8 dollar note which, again, if you want to look at it,
9 it's Exhibit B in the Complaint, principal is payable
10 on demand; is that right?

11 A Oh, yes.

12 Q Okay. Was there any restriction -- what is
13 your understanding insofar as there being or not being
14 any restriction on the note as to when the note could
15 be prepaid by CCI?

16 Could the note be prepaid by CCI anytime
17 prior to the demand?

18 A Yes.

19 Q Okay. The bank -- so CCI didn't have to
20 wait for the demand; it could just prepay it at any
21 time if it wanted to, had the funds?

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1 private sources; is that correct?

2 A Yes.

3 Q Did CCI ever obtain an additional five
4 hundred thousand, if you know, from private sources?

5 A I do not know.

6 Q Was it monitored in any way by the bank as
7 to whether or not there was an additional five hundred
8 thousand obtained by CCI?

9 A No, it was not.

10 Q The memo then goes on to say that this
11 should be sufficient to meet their current cash flow
12 shortage.

13 Tell me what you mean by that from the
14 banker's perspective.

15 A I must have received documents showing what
16 their cash flow position was going to be over the next
17 couple months and determined by that that this should
18 get them over the hurdle.

19 Q How was this note to be repaid?

20 A Profits.

21 Q Is that your answer?

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1 A Yes.

2 Q Okay. Was there any restriction with
3 respect to the 1.2 million dollar note as to the
4 source of funds that could be used to repay the note?

5 A The note should have been repaid -- okay,
6 ask the question -- what was the question?

7 Q Is there any restriction in the note in
8 regard to the source of funds that could be used to
9 repay the note?

10 A Not in the note.

11 Q I understand, I'm only sticking to the note.

12 A Not in the note.

13 Q Okay. Now, we'll come back to that because
14 I know you're anxious to say something.

15 Let's look at Schwartz 5.

16 This Schwartz 5, this is your memo; is that
17 correct?

18 A Yes.

19 Q And it says that we decided that an increase
20 of 1.2 million will be done on a temporary basis and
21 CCI will get an additional five hundred thousand from

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1 MR. GEBHARDT: Is there a question?

2 MR. SWICHAR: Yeah.

3 I asked is that your answer, profits?

4 MR. GEBHARDT: He's answered.

5 MR. SWICHAR: Well, he's thinking --
6 he's mulling it over, I think, but if you want, I'll
7 accept it.

8 I'm just giving him a second chance
9 because I can see he wants to say more.

10 Q (By Mr. Swichar) If profits is your answer,
11 fine.

12 A Well, this would have been repaid -- yeah.

13 Q From profits?

14 A (Nodding head affirmatively.)

15 Q Is that right?

16 A Umh-humh, abundance of cash and -- okay,
17 profits and abundance of cash flow.

18 Q Okay. Abundance of cash flow means from
19 excess cash flow from excess, not used to pay
20 expenses?

21 A And any other debt.

16 (Pages 61 to 64)

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1 Q Okay. Where was cash flow to be deposited
2 at the bank?
3 A Cash flow could have been deposited -- they
4 could have deposited it anyplace they wanted to,
5 didn't necessarily have to be at the bank.
6 Q Well, there are loan documents that say all
7 business deposits are to be deposited in the checking
8 account --
9 A Okay.
10 Q -- is that correct?
11 A I don't know.
12 Q Well, we can review that, but there are
13 documents --
14 MR. GEBHARDT: Maybe you'd like to
15 point out where it says --
16 MR. SWICHAR: Sure.
17 MR. GEBHARDT: -- that it has to be
18 deposited in the checking account.
19 MR. SWICHAR: It says primary deposits
20 will be deposited in the bank.
21 MR. GEBHARDT: Primary is not --

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1 MR. SWICHAR: I know.
2 MR. GEBHARDT: The word primary doesn't
3 mean exclusive, and I understand what was done and how
4 it was done and it said primary, but you're
5 interpreting -- you made a representation that the
6 bank's documents said they couldn't have an account
7 anywhere but the bank, and I don't think there's
8 anything that says that.
9 MR. SWICHAR: Well, let's find the
10 exact language so there's no confusion about that.
11 Do you know off the top of your head
12 where it is?
13 MR. GEBHARDT: No, but I'm sure it says
14 primary, not exclusive.
15 MR. SWICHAR: Okay. It says the
16 primary business deposits will be deposited in the
17 bank's checking account; is that fair, Mr. Gebhardt?
18 MR. GEBHARDT: I think they've
19 indicated that the primary accounts for CCI shall be
20 maintained at the bank.
21 MR. SWICHAR: Okay.

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1 Q (By Mr. Swichar) Where were the bank's
2 profits to be deposited, as far as you're concerned?
3 MR. GEBHARDT: The bank's profits?
4 A The bank's?
5 Q CCI's profits, to be deposited, as far as
6 you're concerned.
7 A In their deposit account.
8 Q Okay. And where was revenues from cash flow
9 to be deposited from CCI?
10 In the bank's checking account as well?
11 A Yes.
12 Q Okay. Did you ever have any specific
13 discussions, if you recall, with Mr. Ortenzio as to
14 when and how the 1.2 million dollar note would be
15 repaid?
16 A I believe there was a letter indicating when
17 it had to be paid by.
18 Q Okay. Anything else?
19 A Not that I can recall.
20 Q I think we're going to come to the letter.
21 I think there's a commitment letter, we'll come to

Page 68

1 that.
2 Did you ever monitor CCI's use of the
3 1.2 million dollar loan funds?
4 A No.
5 Q I show you what has been marked for
6 identification as Exhibit Schwartz 6.
7 A Okay.
8 Q Do you recall how this document came about?
9 Was it prepared by you?
10 A Yes.
11 Q How did it come about?
12 Why was this document prepared?
13 A This was a result of a meeting with CCI,
14 that they were going to need additional funds because
15 of cash flow shortages.
16 Q Was this -- was this S-6 preceded by the
17 1.2 million dollar note, which is dated six days
18 later?
19 A Yes.
20 Q Okay. Was it initially contemplated by the
21 bank that the four million dollar line of credit would

17 (Pages 65 to 68)

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1 be increased to five million as reflected on S-6?
 2 A Yes.
 3 Q Okay. What caused the bank to contemplate
 4 that in contrast to what ultimately occurred?
 5 A Mr. Ortenzio's objection to the surety.
 6 Q Okay. So correct me if I'm wrong, the bank
 7 initially contemplated increasing the four million
 8 dollar line of credit to a five million dollar line of
 9 credit, correct?
 10 A Yes.
 11 Q And the bank initially requested that
 12 Mr. Ortenzio guarantee the full five million dollars?
 13 A Yes.
 14 Q And that was refused by Mr. Ortenzio?
 15 A Yes.
 16 Q And did that require the bank and CCI to go
 17 back and basically rework the facility to the
 18 1.2 million dollar loan that it ultimately became?
 19 A Yes.
 20 Q Did the bank ever request Mr. Ortenzio at
 21 any time to guarantee any part of the four million

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1 A Not that I recall.
 2 Q Okay. Did the bank then -- hopefully, we
 3 understand what I'm saying -- did the bank then ever
 4 request Mr. Ortenzio to guarantee any part of the four
 5 million dollar line of credit?
 6 I used one million as an example. Now I'm
 7 just forgetting that example.
 8 Any part of the four million, in any amount.
 9 A Not that I recall.
 10 Q Was there any discussion when the
 11 1.2 million dollar note facility was granted as to
 12 when it would be paid, when it had to be paid, other
 13 than on demand?
 14 A Yes, I believe there was a, a date that it
 15 was to be paid by.
 16 Q That's in the loan commitment?
 17 A Yes, I believe so.
 18 Q I'm just curious.
 19 From a banking procedures point of view, why
 20 wouldn't that be put in the note itself in contrast
 21 to -- it has to be paid on a certain date in contrast

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1 dollar line in contrast to the four -- in contrast to
 2 the full four million dollar line reflected on S-6?
 3 MR. GEBHARDT: I'm going to -- I think
 4 you've got your --
 5 MR. SWICHAR: I'll say it differently.
 6 MR. GEBHARDT: Okay, because I think
 7 you got the numbers confused.
 8 MR. SWICHAR: All right.
 9 Q (By Mr. Swichar) Did the bank ever request
 10 at any time Mr. Ortenzio to guarantee any part of the
 11 four million dollar line of credit in contrast to the
 12 complete four million dollar amount?
 13 For example --
 14 MR. GEBHARDT: You mean the four plus
 15 the one million?
 16 MR. SWICHAR: No, no. Let's isolate
 17 the four million dollar line of credit.
 18 Q (By Mr. Swichar) Did the bank ever say,
 19 Mr. Ortenzio, we want you to guarantee one million
 20 dollars worth of the four million dollar line of
 21 credit?

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1 to on demand basis?
 2 Is that normal procedure to do that?
 3 A To do --
 4 Q To have a date in the loan commitment
 5 letter, a specific date, but whereas the actual note
 6 would say payable on demand.
 7 A Yes, that is normal.
 8 Q Why wouldn't the bank put the date on as the
 9 outside date -- for example, it's due on April 30th,
 10 2000 -- or prior thereto on demand?
 11 A I don't know.
 12 Q You don't see that in your banking
 13 experience?
 14 A See what?
 15 Q See an outside date coupled with an on
 16 demand note in the note itself.
 17 A Those are two -- if it has a date on it,
 18 they are two different notes.
 19 Notes are either on demand, or if they are a
 20 term loan.
 21 Q Was it ever contemplated that the four

18 (Pages 69 to 72)

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1 million dollar note would be repaid before the
 2 1.2 million dollar note?
 3 A It would hope that that four million would
 4 be repaid before the 1.2 would be repaid.
 5 Q Let's forget hopes.
 6 Did the bank provide any documents that were
 7 signed that required repayment of the four million
 8 before the 1.2 million?
 9 A Not specific to that fact.
 10 Q How about generally to that fact?
 11 A No, no documents.
 12 Q Okay. There's no document that require the
 13 repayment of the four million prior to the
 14 1.2 million, were there?
 15 A No.
 16 Q And, in fact, the four million dollar line
 17 of credit was long-term; is that correct?
 18 A No, that is incorrect.
 19 Q It was not long-term?
 20 A That was on a year-to-year basis.
 21 Q Okay, but it went back to at least ten

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1 years, didn't it?
 2 A It still had to be renewed annually.
 3 Q Okay, but there was no reason to think it
 4 wouldn't continue to be renewed annually as it had
 5 been for the prior ten years or so?
 6 A There's always that possibility.
 7 Q Okay. The 1.2 million dollar note facility
 8 was a temporary facility, wasn't it?
 9 A Yes.
 10 Q Okay. The four million dollar facility was
 11 not deemed to be or considered to be temporary; is
 12 that correct?
 13 A That's correct.
 14 Q Let's look at Exhibit C of the Complaint,
 15 which is the Ortenzio guarantee.
 16 This is on a bank form dated November 8,
 17 1999?
 18 A Yes.
 19 Q Did you prepare it?
 20 Were you involved in the signing and
 21 preparation of this note?

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1 MR. GEBHARDT: The suretyship.
 2 Q The suretyship.
 3 A I was involved with the signing.
 4 MR. SWICHAR: Let's go off the record
 5 for a minute.
 6 (Discussion off the record.)
 7 MR. SWICHAR: Let's take a break, okay?
 8 (Thereupon, a recess was taken.)
 9 Q (By Mr. Swichar) Let's go back for a moment
 10 to S-6, which is your memo of November 2, 1999.
 11 I note that when you were contemplating
 12 increasing the four million dollar line of credit to
 13 four million dollars -- to five million -- the note --
 14 you noted on S-6 that the increase would expire on
 15 February 28th, 2000.
 16 Where did that date come from?
 17 A It was the bank's date that we decided
 18 upon --
 19 Q Okay.
 20 A -- how long the increase would be good for.
 21 Q Okay, except now -- and we'll come to it in

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1 a minute -- but when I go to Schwartz 8 later, which
 2 is your commitment letter, it states that the loan
 3 would expire a month later, on March 31, 2000.
 4 Do you know how that one-month extension
 5 came about?
 6 A Could I see that?
 7 Q Yeah, I'll show that to you now; I'm sorry,
 8 I should have done that.
 9 (Document was handed to the witness.)
 10 Q Do you see that there?
 11 A Well, this is for the million two.
 12 Q Yes.
 13 A This has nothing to do with the line.
 14 Q No, I understand, but if you look at S-6,
 15 which dealt with the ultimate increase, correct, in
 16 the facility?
 17 Let me take it by the numbers.
 18 S-6 reflects the bank's initial
 19 contemplation of increasing the line from four to five
 20 million and to be fully guaranteed by Mr. Ortenzio and
 21 to expire on February 28, 2000, correct?

19 (Pages 73 to 76)

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1 A Yes.

2 Q But ultimately what happened was there was a

3 1.2 million dollar new note guaranteed by

4 Mr. Ortenzio, but the expiration date as reflected in

5 S-8 was a month later.

6 So how did it go from February 28th to

7 March 31st is my question.

8 A I don't recall the specifics.

9 Q How about the generalities?

10 A I don't recall the generalities, either.

11 Q You understand whenever you answer a

12 question you don't recall the specifics, I've got to

13 come back and ask you how about generalities?

14 A Yes.

15 Q Okay, but you have no recollection

16 specifically or generally as to that one-month

17 extension?

18 A That is correct.

19 Q Okay. All right, now -- you can hold on

20 that. We'll come back to it later.

21 I'm going to show you Exhibit Schwartz 7,

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1 which is the equipment note of November 20, 1998, for

2 two million dollars.

3 Were you involved in the preparation and

4 execution of this?

5 A The execution.

6 Q Yes.

7 Were you?

8 A Only the execution.

9 Q Okay, I want to come back to that. I forgot

10 to ask you -- let's go back to the guarantee, which is

11 going to be Exhibit C of the Complaint.

12 Do you have that in front of you?

13 There are changes on that; is that correct?

14 A Yes.

15 Q How did those changes come about, if you

16 recall?

17 A I don't recall how they actually came about.

18 Q Do you recall their being requested by

19 Mr. Ortenzio or Sheri Phillips?

20 A By Mr. Ortenzio, yes.

21 Q And did you approve the changes?

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1 A Yes.

2 Q Okay. Tell me from a banker's perspective,

3 if you turn to Page 2, there's an asterisk in the

4 second paragraph, then it goes on to say under the

5 twelve -- 1.2 million dollar commercial loan note.

6 What does that change reflect from your

7 perspective?

8 A That the surety applies to the million two

9 note.

10 Q And it doesn't apply to any other liability

11 of CCI?

12 A That appears to be correct.

13 Q Okay. So the initial form, if signed by

14 Mr. Ortenzio, would have been a guarantee of not only

15 the 1.2 million, but of the four million as well as

16 any other loan facility; is that correct?

17 A Yes.

18 Q And the 1.2 million dollar note was

19 modified -- guarantee -- was modified, or a suretyship

20 was modified to make it understood that the guarantee

21 would only extend to the 1.2 million dollar facility;

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1 is that correct?

2 A Yes.

3 Q Okay. All right, let's go back to the

4 equipment note.

5 You were present at the signing of that?

6 A Yes, I was.

7 Q Were interest payments made on the equipment

8 note monthly?

9 A Along with principal, yes.

10 Q And principal payments were made on a

11 monthly basis on account of the equipment note; is

12 that correct?

13 A Monthly principal payments were made on the

14 equipment note.

15 Q Okay. It's my understanding up to February,

16 2000, or so the balance on the two million dollar

17 equipment note was down to about 1.2 million in

18 principal.

19 Does that sound correct?

20 Do you have any reason to doubt that?

21 That's what I read from the note -- loan documents.

20 (Pages 77 to 80)

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1 A Okay.
 2 Q Okay. You don't have any reason to doubt
 3 that?
 4 A No.
 5 Q Okay. How -- how were those payments on
 6 account of the equipment note, the principal or
 7 interest, repaid?
 8 What was the mechanism for that?
 9 A I'm not sure I totally understand the
 10 question.
 11 Q Well, there were repayments monthly, both
 12 interest and principal, on the equipment note?
 13 A Umh-humh.
 14 Q How were they done?
 15 Did Mr. Ortenzio come in with a bucket of
 16 cash? How did it -- how was it accomplished?
 17 A By check, as far as I can recall.
 18 Q Are you sure about that?
 19 A Not one hundred percent.
 20 Q Well, how would I know that?
 21 A There -- there would be two methods to repay

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1 A If they were an automatic payment, there
 2 would -- there was a document that --
 3 Q Aren't automatic payments reflected on that?
 4 A No, not automatic payments.
 5 Q Are payments reflected?
 6 A Payments are reflected.
 7 Q And how are they reflected?
 8 A Just as a reduction of principal.
 9 Q Okay. And is it done on the same time each
 10 month, approximately, same amount each month, on
 11 principal, approximately?
 12 Does that help you out?
 13 A It doesn't appear as if the payments were
 14 taken automatically by the bank.
 15 Q Why do you say that?
 16 A Because they occur on different dates.
 17 If they were taken by the bank, it would be
 18 the same day every month.
 19 Q Interest, also?
 20 Were there separate checks for interest
 21 payments, or were they automatically debited?

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1 it.
 2 Either we would automatically take the money
 3 out of the account because of an agreement that was
 4 prior, or they would pay us by check.
 5 Q Was it done either way?
 6 A No.
 7 Q There's a document that your attorney
 8 provided me just yesterday, or last week actually,
 9 which are a printout of the computer screens for the
 10 Allfirst CCI loans.
 11 Would this -- looking at this document,
 12 would this help you answer that question as to how the
 13 repayments on the equipment note were made?
 14 (Document was handed to the witness.)
 15 A No.
 16 Q It doesn't help you answer the question?
 17 A No.
 18 Q Well, how would I know, other than asking
 19 Mr. Ortenzio how he made payments on the equipment
 20 note, including interest and principal, whether they
 21 were by check or sweeps from the checking account?

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1 A Ask the question again.
 2 Q How were interest payments made?
 3 Debited from the checking account on an
 4 automatic basis or --
 5 A To which loan are we talking?
 6 Q The equipment note.
 7 A It appears principal and interest payments
 8 were made by check.
 9 Q Because of the different dates?
 10 A Yes.
 11 Q If Mr. Ortenzio were to tell you that there
 12 were automatic debits and not checks, would you say
 13 that's not true, or is it possibly true?
 14 You know what, Mr. Schwartz? If you don't
 15 know, you don't know, and at the end of the day, it
 16 doesn't matter.
 17 A It's going to take some time to determine
 18 that for sure.
 19 Q Okay, let's put this aside.
 20 The checks as you think occurred were
 21 written to make payment on the equipment note,

21 (Pages 81 to 84)

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1 principal or interest, that would be from the checking
 2 account, right?
 3 That -- CCI's checking account at the bank?
 4 A Yes.
 5 Q Okay. And that -- it's the same checking
 6 account that was tied into the cash management
 7 facility and the four million dollar line of credit?
 8 A I would think so.
 9 Q All right. So if CCI made a repayment on
 10 account of the equipment note, principal or interest,
 11 that would have the impact of drawing down on the line
 12 of credit, wouldn't it?
 13 A Possibly.
 14 Q Possibly?
 15 You mean sometimes it's possible, sometimes
 16 it's not, depending on when it's hit, or what?
 17 A No, you are correct; it would have the
 18 impact of drawing down the line of credit, yes.
 19 Q Okay. And it would reduce availability on
 20 the line of credit; is that correct?
 21 A Yes, that's correct.

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1 Q Okay. So when payments were made on the
 2 equipment note to the bank by CCI, it would draw the
 3 line of credit and reduce availability, right?
 4 A Each month.
 5 Q Each month.
 6 Am I right?
 7 A Yes.
 8 Q Okay. Now, interest on the 1.2 million
 9 dollar note was paid monthly; is that correct?
 10 A Yes.
 11 Q And that was tied in to the cash management
 12 facility as well; is that correct?
 13 A What do you mean tied in?
 14 Q Well, when interest payments were paid to
 15 the bank on the 1.2 million dollar note, that had the
 16 same impact as payments on the equipment note had;
 17 namely, it would be a draw on the four million dollar
 18 line of credit.
 19 Is that correct?
 20 A Yes.
 21 Q Okay. Look now at S-8 which you have in

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1 front of you.
 2 MR. GEBHARDT: Do I have that?
 3 MR. SWICHAR: Oh, I'm sorry; no, I
 4 don't think you do.
 5 (Document was handed to counsel.)
 6 Q (By Mr. Swichar) This basically -- is S-8
 7 basically the commitment letter for the 1.2 million?
 8 A Yes.
 9 Q Now, the 1.2 million was fully advanced at
 10 its inception?
 11 A Yes.
 12 Q Okay. And was it deposited to CCI's
 13 checking account at Allfirst Bank?
 14 A Yes.
 15 Q Okay. And when the 1.2 million was
 16 deposited in CCI's checking account, again, that's the
 17 same checking account that's tied in to the cash
 18 management facility and the four million dollar line
 19 of credit; is that correct?
 20 A Yes.
 21 Q Okay. Now, when the 1.2 million dollar line

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1 of -- when the 1.2 million dollar loan was deposited
 2 into CCI's checking account, that would have increased
 3 the borrowing capacity on the four million dollar line
 4 of credit; is that correct?
 5 A It would have the effect of paying any
 6 principal outstanding back on the four million dollar
 7 facility.
 8 Q Okay. So put another way, when the 1.2
 9 million dollar deposit was made in the CCI bank
 10 account that was tied in to the four million dollar
 11 line of credit, it would have had the effect of
 12 decreasing the loan balance owed on the four million
 13 dollar line of credit by 1.2 million dollars?
 14 A Yes.
 15 Q Okay. Let me show you what has been marked
 16 for identification as Exhibit Schwartz 9, the document
 17 that was furnished by the bank.
 18 Do you know whose handwriting is at the
 19 bottom of S-9, whose notes?
 20 A No, I do not.
 21 Q Okay. Is this a type of document that

22 (Pages 85 to 88)

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1 you've seen before today?
 2 A I've seen this.
 3 Q When did you first see it?
 4 A Oh, this particular document?
 5 Q Yes.
 6 Well, is this part of the document that you
 7 would have reviewed in connection with your review of
 8 the cash management facility at the bank?
 9 This would reflect activity on a particular
 10 day or days?
 11 A This is the transaction history on the line
 12 of credit.
 13 Q For the day that the 1.2 million dollar was
 14 repaid, February 11th?
 15 I'll represent to you that these are the
 16 bank's notes on this exhibit. They're not mine or
 17 anyone else's that I know.
 18 A No, I'm -- I -- if part -- if the million
 19 two is part of this million three, that occurred, yes.
 20 Q Well, consistent with Answers to
 21 Interrogatories, it would appear to me that CCI repaid

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1 four million dollar line was two point -- two and a
 2 half -- two million five hundred and thirty-four
 3 thousand one hundred fifty-four dollars and
 4 eighty-four cents; is that correct?
 5 A Yes.
 6 Q Okay. Now, this is basically the same way
 7 it would work with the equipment note, is that
 8 correct, the same type procedure, the same type of
 9 printout?
 10 MR. GEBHARDT: Objection.
 11 Q The same type of calculations would be made;
 12 is that correct?
 13 MR. GEBHARDT: Wait, wait.
 14 Q The form.
 15 MR. GEBHARDT: You've asked about three
 16 different questions using different terms that -- I
 17 mean, a printout is a printout, and you're talking
 18 about procedures and what was done and what's
 19 reflected on the printout.
 20 MR. SWICHAR: That's fair. I'll
 21 rephrase the question.

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1 the 1.2 million dollar note on February 11th, 2000.
 2 Is that consistent with the document?
 3 A Yes.
 4 Q And it would reflect that the repayment
 5 increased the balance on the four million dollar line
 6 of credit by 1.2 million, is that correct, plus
 7 interest that was owed somewhere?
 8 A Yes.
 9 Q And on February 10th, one million two
 10 hundred and thirty-two thousand three hundred and
 11 twenty-eight dollars was owed on the four million
 12 dollar line of credit; is that correct?
 13 A Yes.
 14 Q And after the 1.2 million dollar note was
 15 paid, the loan balance on the four million dollar line
 16 increased by one million three hundred and one
 17 thousand eight hundred and twenty-six dollars; is that
 18 correct?
 19 A Yes.
 20 Q And the total loan balance after the sweep,
 21 after the 1.2 million dollar loan was repaid, on the

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1 MR. GEBHARDT: Yeah, just rephrase it.
 2 MR. SWICHAR: It's a confusing
 3 question. I didn't mean to do that.
 4 Maybe I can't answer the question -- I
 5 can't ask the question the right way, but I'll try.
 6 Q (By Mr. Swichar) When the 1.2 -- when the
 7 payments were made on the one point -- on the two
 8 million dollar equipment note, whether they be
 9 principal or interest, would similar-type calculations
 10 be computerized as we see with respect to S-9?
 11 Did that question make sense?
 12 There were no objections, so maybe it did.
 13 MR. GEBHARDT: Not necessarily, but --
 14 still struggle with it.
 15 Q In other words, sir --
 16 A I don't know --
 17 Q I'll rephrase -- go ahead.
 18 Are you able to answer the question?
 19 A No, I'll hear what you have to say.
 20 Q Okay. If I wanted to see what happened on a
 21 certain date, if a particular payment was made on

23 (Pages 89 to 92)

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1 account of the equipment note, would I punch up a
 2 similar-type document from the same computer program?
 3 A I don't think you'd be able to tell if an
 4 equipment payment was made by looking at this.
 5 Q This being S-9?
 6 A Yes.
 7 Q If I wanted to know what the particular
 8 balance was or a particular payment was made on the
 9 one -- on the two million dollar equipment note, on
 10 the two million dollar equipment note, what document
 11 would the bank have to retrieve to tell me that?
 12 A I would look at their checking account
 13 statement.
 14 Q Yes.
 15 A Yes.
 16 Q And what would that show?
 17 A That would show the check written for the
 18 equipment line.
 19 Q Well, suppose there was a -- there was a
 20 check written and deposited in the CCI account,
 21 correct?

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1 The check would have to be deposited first,
 2 right?
 3 MR. GEBHARDT: Wait a minute.
 4 You're -- CCI is writing the check and
 5 depositing --
 6 Q CCI is depositing a check into its checking
 7 account, right? Let's assume.
 8 The next step would be for the bank to sweep
 9 that check on account of a credit to the equipment
 10 note; is that correct?
 11 A I'm confused.
 12 Q How -- how would -- how would I know that
 13 the bank took a particular deposit from me as CCI and
 14 credited it towards the equipment note?
 15 What document would you have to reflect
 16 that?
 17 Because your -- the checking account
 18 wouldn't tell me what happened to that deposit. The
 19 checking account statement wouldn't tell me what
 20 happened to that deposit.
 21 How would I know that on a particular day a

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1 particular deposit was credited to the equipment note?
 2 MR. GEBHARDT: I object to that.
 3 A A deposit or a payment?
 4 Q A payment.
 5 A How would --
 6 Q How would I know on a particular day I had
 7 on deposit X dollars in my checking account of which Y
 8 dollars was utilized as a payment towards the
 9 equipment note?
 10 And if I asked the bank for a document
 11 showing me that, would the bank be able to produce
 12 such a document that would show me that?
 13 Because the checking account statement
 14 wouldn't show that.
 15 MR. GEBHARDT: Objection.
 16 Are you asking, or are you testifying?
 17 MR. SWICHAR: I'm asking.
 18 Q (By Mr. Swichar) Do you understand the
 19 question?
 20 A No.
 21 Q No, okay.

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1 I put money into my CCI checking account.
 2 At the end of the month, I get a statement, correct?
 3 A Yes.
 4 Q Would that statement show me that certain
 5 deposits had been allocated on account of the payment
 6 of the equipment note?
 7 A No.
 8 Q Okay. How would I know when -- if that has
 9 been done?
 10 How would I know that a certain deposit was
 11 allocated as a credit towards the equipment note?
 12 What document would I have, or what would I
 13 request to see that?
 14 A A deposit --
 15 MR. GEBHARDT: Let me put an objection
 16 on the record, and you can step out so I'm not accused
 17 of coaching the witness.
 18 (The witness left the conference room.)
 19 MR. SWICHAR: You want this on the
 20 record?
 21 MR. GEBHARDT: Yeah.

24 (Pages 93 to 96)

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1 MR. SWICHAR: Okay.
 2 MR. GEBHARDT: My objection is that you
 3 are misdescribing to him the function of the line of
 4 credit.
 5 Checks would come in, or wire transfers
 6 would come into the bank. If there was a positive
 7 balance the aggregate would reflect, and the checks
 8 that were presented would be paid. If there was a
 9 negative balance after crediting the checks, there
 10 would be a draw on the line of credit.
 11 MR. SWICHAR: Right.
 12 MR. GEBHARDT: You're suggesting in
 13 some way that a check may come from a specific
 14 customer --
 15 MR. SWICHAR: No, I didn't mean to.
 16 MR. GEBHARDT: -- of CCI.
 17 MR. SWICHAR: I didn't mean to.
 18 MR. GEBHARDT: And then that that
 19 specific check credit --
 20 MR. SWICHAR: Larry --
 21 MR. GEBHARDT: -- would be allocated to

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1 MR. SWICHAR: Well, it's a lot easier
 2 when he's gone.
 3 (The witness returned to the conference
 4 room.)
 5 Q (By Mr. Swichar) Mr. Schwartz, how would I
 6 know as CCI when and how a particular payment has been
 7 made on account of the equipment note?
 8 A Next month's bill --
 9 Q Okay.
 10 A -- would show the reduction.
 11 Q Okay. Now, if I went back to the bank and I
 12 said, show me your document that reflects that on a
 13 certain day a payment was made, is there a
 14 computerized document such as S-9?
 15 A Yes.
 16 Q Okay. And would there be a corresponding
 17 increase on the four million dollar line of credit?
 18 MR. GEBHARDT: Objection.
 19 A If that was the only check presented that
 20 day, yes.
 21 Q Okay, I don't understand that answer.

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1 the equipment note.
 2 MR. SWICHAR: Larry, I just want to
 3 know, so you understand, how would a borrower such as
 4 CCI know that a payment was made on a particular day
 5 against -- as a credit towards the equipment note.
 6 The check -- the checking account
 7 statement wouldn't tell me that.
 8 MR. GEBHARDT: Well, I don't know if it
 9 would or wouldn't, but that's a different question.
 10 You've been asking him about a specific
 11 deposit --
 12 MR. SWICHAR: I'll try to ask him the
 13 right way.
 14 MR. GEBHARDT: -- and how would we know
 15 that that deposit got applied --
 16 MR. SWICHAR: I'll try to --
 17 MR. GEBHARDT: -- to the payment.
 18 MR. SWICHAR: I'll broaden it.
 19 MR. GEBHARDT: Just -- yeah. I mean,
 20 just ask him like you asked me; how would you know
 21 when --

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1 Would you explain it?
 2 Let me go back and rephrase it.
 3 The 1.2 -- I keep saying the 1.2 -- the
 4 equipment note, principal payments or interest were
 5 paid, let's assume, by checks, CCI checks; is that
 6 correct?
 7 A Yes.
 8 Q And those checks were deposited in the CCI
 9 checking account, right?
 10 The checks were -- the checks were initially
 11 deposited in the CCI checking account, right?
 12 A Checks from where?
 13 Q Checks from -- checks from profit, checks
 14 from wherever checks come from.
 15 A Customers?
 16 Q Customers.
 17 A Okay.
 18 Q Those checks would then be deposited in the
 19 checking account at Allfirst Bank, and payments on --
 20 and they would be directed to repay the equipment note
 21 and/or interest on the equipment note, correct?

25 (Pages 97 to 100)

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1 A No.
 2 Q No?
 3 A The checks coming in from a customer that
 4 CCI is depositing is going to go into their checking
 5 account and then be applied to the line.
 6 Q Okay. Are you suggesting, then, that when
 7 CCI made a repayment on account of the equipment note
 8 it was a separate check?
 9 A Yes.
 10 Q Okay. CCI writes a separate check on
 11 account of the equipment note.
 12 Does it contact you to take that deposit and
 13 apply it?
 14 MR. GEBHARDT: Objection.
 15 Deposit?
 16 Q When CCI takes a check and deposits it in
 17 the checking account, how do you know to apply it to
 18 the equipment note?
 19 A I wouldn't do anything with the deposit.
 20 Q Okay. What do you mean you wouldn't do
 21 anything with the deposit?

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1 MR. GEBHARDT: I mean, let me pose an
 2 objection.
 3 You're confusing checks that come from
 4 customers that are deposited in the account with
 5 checks that CCI might write from its account in
 6 payment of some bill.
 7 Q Okay. CCI writes a check out of its
 8 checking account in payment of -- as a repayment of
 9 the equipment note.
 10 Does that happen?
 11 A Yes.
 12 Q Okay. And that bank -- that check is
 13 written to the bank, correct?
 14 A Yes.
 15 Q And it will say on it in repayment of
 16 equipment note, correct?
 17 A Something to that effect.
 18 Q Okay. Now, when that check is presented and
 19 paid to the bank, it has the same effect of drawing --
 20 it draws a corresponding amount on the four million
 21 dollar line of credit?

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1 A Yes.
 2 Q Okay. Do you have any -- does the bank have
 3 any document similar to S-9 that would relate to the
 4 deposit made by the bank of the initial 1.2 million
 5 dollar note proceeds?
 6 A Yes.
 7 MR. SWICHAR: Can I request that,
 8 please?
 9 MR. GEBHARDT: You should have it.
 10 MR. SWICHAR: I don't have it. I
 11 don't.
 12 All I have -- off the record.
 13 (Discussion off the record.)
 14 Q (By Mr. Swichar) Mr. Schwartz, can you tell
 15 from that document the entry that deals with the
 16 deposit of the 1.2 million in November of '99?
 17 A This is going to take some time.
 18 MR. GEBHARDT: Let me just say for the
 19 record, my understanding is that if the 1.2 million
 20 was deposited on November 9, if that's the actual date
 21 of the disbursement, if there were other checks that

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1 may have come in from CCI's customers, it may be an
 2 aggregate at the end of the day deposit, so it
 3 wouldn't just say one million two.
 4 MR. SWICHAR: I understand.
 5 MR. GEBHARDT: It might be a million
 6 eight --
 7 MR. SWICHAR: Right, right.
 8 MR. GEBHARDT: -- three thirty-nine or
 9 something.
 10 Q (By Mr. Swichar) Can you find November 9 or
 11 thereabouts and see if that is reflected on there?
 12 A Yes.
 13 Q Did you find it there?
 14 A Umh-humh.
 15 Q Can you just put a little X next to it?
 16 (Witness complying.)
 17 Q Let me have it back.
 18 (Document was handed to counsel.)
 19 Q Now, does what you just X'd off reflect the
 20 draw of the four million dollar line of credit similar
 21 to a situation as in S-9?

26 (Pages 101 to 104)

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1 MR. GEBHARDT: Wait a minute.
 2 You said a draw. Draw means you're
 3 taking money out.
 4 MR. SWICHAR: Right.
 5 MR. GEBHARDT: You're asking him to
 6 indicate where money was put in.
 7 MR. SWICHAR: I'm sorry, an increase on
 8 the four million dollar line of credit, if it
 9 increased availability.
 10 Does it reflect -- I'll rephrase it.
 11 Q (By Mr. Swichar) Does what you just X'd off,
 12 a deposit of the 1.2 million on November 9th, reflect
 13 the impact on the four million dollar line of credit
 14 as we have with respect to S-9?
 15 A You can't specifically see the million two.
 16 Q I can't.
 17 Well, out there in the bank's universe, is
 18 there a document similar to S-9 that provides me the
 19 same information, the relationship between the 1.2
 20 million and the four million dollar line of credit?
 21 A I believe you have this right here, but it's

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1 what occurred for the day on 11/9. You don't see a
 2 million two coming in because checks were presented
 3 for payment that were paid that day, also.
 4 Q What do you have on November 9th that you
 5 feel would be encompassed -- that would encompass the
 6 1.2 million?
 7 Describe to me the transaction because I
 8 can't read bank language.
 9 The best of your ability, what occurred on
 10 that day?
 11 A Well, on that day, we had to advance off the
 12 line a hundred and eight thousand dollars.
 13 Q Off the four million dollar line?
 14 A Yeah, we increased the outstanding on the
 15 four point -- on the four million dollar line that
 16 day.
 17 Q By how much?
 18 A One hundred and eight thousand dollars.
 19 Q Okay. Where does the 1.2 million come into
 20 play?
 21 Is there any mention or indication of it?

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1 A No.
 2 Q Well, then, that's not the right day, then,
 3 is it?
 4 A Yes.
 5 Q This doesn't deal with the 1.2 million, does
 6 it?
 7 A Yes, it does.
 8 Q How?
 9 Was the -- does it reflect the increase in
 10 the availability of the four million dollar line of
 11 credit to compensate for the 1.2 million deposit,
 12 similar to a document such as S-9?
 13 That's what I'm trying to figure out.
 14 In other words, on November 9, 2000, when
 15 the 1.2 million dollar facility was deposited, what
 16 impact did that have on the four million dollar line
 17 of credit?
 18 Did it go from what to what?
 19 A Okay. There was a payment here that was
 20 made similarly that the balance went from two million
 21 three hundred fifty-three thousand seven hundred

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1 fifty-one dollars to one million one hundred
 2 sixty-four thousand eight hundred eighteen dollars on
 3 the line of credit.
 4 Q On the four million dollar line of credit?
 5 A Yes.
 6 Q Can you say that again so I listen better
 7 this time?
 8 On the day the 1.2 million dollar facility
 9 was deposited, what happened to the four million
 10 dollar line of credit?
 11 A The loan balance went from approximately
 12 2.3 million to 1.1 million.
 13 Q Okay. So the 1.2 million, as we said
 14 earlier, reduced the balance on the four million
 15 dollar line of credit and increased the availability
 16 on the same four million dollar line of credit,
 17 correct?
 18 MR. GEBHARDT: It depends.
 19 Q On the day that the 1.2 million dollar was
 20 deposited, it increased the four million dollar line
 21 of credit availability by 1.2 million, correct?

27 (Pages 105 to 108)

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1 A Yes.
 2 Q And it decreased the balance owed on the
 3 four million by the 1.2 million as well?
 4 Decreased the balance owed.
 5 A Yes.
 6 Q Okay. All right, fine, we got there.
 7 So am I correct, then, that the four million
 8 dollar facility, the 1.2 million dollar note, and the
 9 two million dollar equipment note were all tied in to
 10 a single checking account?
 11 MR. GEBHARDT: Objection.
 12 Q You can answer it.
 13 A I don't know how you're tying loans and
 14 checking accounts together.
 15 Q Well, there was only one checking account
 16 where the loans were deposited, and there was only one
 17 checking account from which repayments were made.
 18 MR. GEBHARDT: You don't know --
 19 A I don't know that.
 20 MR. GEBHARDT: You haven't established
 21 that.

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1 You don't know where the equipment loan
 2 was deposited, or whether it was or wasn't.
 3 MR. SWICHAR: Well, he has testified --
 4 and correct me if I'm wrong -- I'll go back.
 5 Q (By Mr. Swichar) The 1.2 -- the two million
 6 dollar equipment note, where was that money deposited
 7 when it was granted?
 8 A Into the checking account at All -- at
 9 Dauphin Deposit.
 10 Q Okay. And that's the same checking account
 11 that was related to the four million dollar line of
 12 credit and the cash management facility?
 13 A Yes.
 14 Q Okay. And when the 1.2 million dollar loan
 15 was made in November, 2000 -- November, '99, rather --
 16 that was deposited into CCI's checking account at the
 17 bank as well?
 18 A Yes.
 19 Q And that's the same checking account where
 20 the equipment note proceeds were deposited, correct?
 21 A Yes.

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1 Q And where the cash management facility was
 2 tied in to the four million dollar line of credit; is
 3 that correct?
 4 A Yes.
 5 Q Okay, thank you.
 6 Suppose CCI wanted to make a payment on
 7 account of the 1.2 million dollar note. How would it
 8 do that?
 9 How would you expect it to do that?
 10 A The same way they make a payment on any of
 11 their other notes.
 12 Q Which would be to write a check to the bank,
 13 correct?
 14 A Yes.
 15 Q Deposit it in the checking account, correct?
 16 A No.
 17 Q Well, turn it over to the bank.
 18 A They would write a check and give it to the
 19 bank.
 20 Q Okay. What would the bank do with it?
 21 A Process the payment.

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1 Q Okay. And when the check -- when the
 2 payment was processed, that would increase as it --
 3 that would be -- that would operate as a draw on the
 4 four million dollar line of credit; is that correct?
 5 A Yes.
 6 Q Okay.
 7 MR. GEBHARDT: I have an objection to
 8 that question as phrased.
 9 Q Okay. You understood the question, you
 10 answered it. I'm satisfied with the answer.
 11 Prior to mid-February, 2000, February 18th,
 12 had Allfirst ever declared a default with respect to
 13 any of CCI's loan facilities?
 14 A Is that the date that the default was
 15 declared?
 16 Q Let's assume it was February 18th or on or
 17 about.
 18 Prior to the default, with a capital D --
 19 MR. GEBHARDT: Wait a minute.
 20 MR. SWICHAR: Do you have an objection?
 21 MR. GEBHARDT: Yeah, there's no

28 (Pages 109 to 112)

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1 evidence that there was a default declared on
 2 February 18.
 3 The default letter was February 24.
 4 MR. SWICHAR: Fine.
 5 Q (By Mr. Swichar) Prior to the default
 6 reflected on Exhibit D of the Complaint -- thank you
 7 for that -- had the bank ever had the occasion to
 8 declare a default on any of CCI's loan facilities?
 9 A Not to my knowledge.
 10 Q Okay. All interest payments were made
 11 timely?
 12 A I would believe so.
 13 Q All principal payments were made timely?
 14 A Without going back and looking, I believe
 15 so.
 16 Q All right.
 17 MR. SWICHAR: What do you want to do --
 18 let's go off the record.
 19 (Discussion off the record.)
 20 (Thereupon, at 12:20 p.m., a luncheon
 21 recess was taken.)

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1 AFTERNOON SESSION (1:03 p.m.)
 2 MR. SWICHAR: Let's resume.
 3 Q (By Mr. Swichar) Mr. Schwartz, in connection
 4 with this lawsuit, have you had any conversations with
 5 any former loan officer of CCI?
 6 A Any former --
 7 Q Loan officers.
 8 Any former officers of CCI.
 9 A No.
 10 Q Since the declaration of the default, which
 11 we've seen a copy of, have you had any conversations
 12 with any former officer of CCI, including
 13 Mr. Ortenzio, Miss Phillips, anyone else?
 14 A No.
 15 Q Do you recall that a meeting occurred on
 16 February 18, 2000, at Allfirst Bank in Harrisburg?
 17 A Yes.
 18 Q How did that meeting come about?
 19 A Can you put in the chronological order, the
 20 dates?
 21 Q Sure, whatever is helpful to you.

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1 A No, I mean as far as -- can you tell me?
 2 Q I can tell you that the meeting occurred on
 3 February 18, 2000.
 4 MR. GEBHARDT: Which is a Friday.
 5 Q Which is a Friday, according to
 6 Mr. Gebhardt.
 7 And there was a meeting in Harrisburg, and I
 8 believe that Mr. Gibson and Mr. Elias were present by
 9 telephone.
 10 A Okay.
 11 Q And there was a whole lot of people.
 12 A Okay. And the question was?
 13 Q How did the meeting come about?
 14 How did the scheduling of that meeting come
 15 about? How did the attendance of those who were there
 16 come about?
 17 A To the best of my recollection, CCI called
 18 and wanted to talk to the bank about cash flow, more
 19 cash flow problems.
 20 Q Called you?
 21 A I don't recall.

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1 Q Okay. And you wouldn't recall who at CCI
 2 made the call?
 3 A Correct.
 4 Q What happened next?
 5 A The meeting was scheduled.
 6 Q How did it come about that those who
 7 attended the meeting in person or by phone attended
 8 the meeting?
 9 A I believe we were informed that the loss CCI
 10 was -- had for 1999 was in the six million dollar
 11 range.
 12 Q Before the meeting?
 13 A Yes.
 14 Q Okay. By -- do you know who said that?
 15 A No, I don't. I don't recall.
 16 Q Okay, okay.
 17 And then, for example, who saw to it that
 18 Mr. Gibson and Mr. Elias attended the meeting by
 19 phone, if you know?
 20 A I don't recall exactly who called them --
 21 Q Did you call them?

29 (Pages 113 to 116)

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1 A -- or got in contact with them.
 2 I do not recall.
 3 Q Okay. It's possible that you did?
 4 A It is possible.
 5 Q And is that because of what was said by CCI
 6 on the phone to whomever it was said to that they
 7 decided to --
 8 A That was a result of that, yes.
 9 Q Okay. What happened at that meeting, to the
 10 best of your recollection?
 11 A The bank was told that the cash flow
 12 problems for CCI had -- were continuing, they were
 13 pretty severe.
 14 Q Was that CCI's word, severe, or was that
 15 your construction of it?
 16 A This would be my construction of it.
 17 Q I'd rather you just tell me what you recall
 18 being said.
 19 MR. GEBHARDT: Do you want --
 20 A Well, then, I do not recall --
 21 MR. GEBHARDT: You want a quote --

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1 severe financial situation, for example.
 2 A Well, we knew the loss to the company was
 3 around the six million dollar mark. Cash flow
 4 continued to be a problem for CCI. CCI had stopped
 5 making some payments to some of their subcontractors
 6 on some jobs.
 7 That's about the best I can recall now.
 8 Q Now, do you remember the various comments by
 9 the various bank representatives?
 10 A No, I do not recall.
 11 Q Did you take any notes at that meeting?
 12 A No, I did not.
 13 Q Did you ever see any memorandum prepared
 14 contemporaneous with or in connection with that
 15 meeting shortly thereafter by anyone?
 16 A No, I did not.
 17 Q Were you ever shown any memo of that
 18 meeting?
 19 A Shortly thereafter, no.
 20 Q Well, at any time, then.
 21 Have you seen a memorandum dealing with that

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1 A -- exactly.
 2 MR. GEBHARDT: -- or to give the
 3 substance of what he recalls?
 4 There's a difference.
 5 MR. SWICHAR: Right, there is a
 6 difference.
 7 I'm asking him to tell me if he has a
 8 recollection of what I -- of what he was told at that
 9 meeting.
 10 MR. GEBHARDT: Exactly?
 11 MR. SWICHAR: It doesn't have to be
 12 exactly. I don't expect him to be that great of
 13 things, remembering things.
 14 Q (By Mr. Swichar) Just generally, what do you
 15 recall being told factually by CCI at that meeting?
 16 MR. GEBHARDT: When you ask him to put
 17 it in his own words, is it a quote or --
 18 MR. SWICHAR: He interpreted those
 19 words as severe, and that's a little bit different.
 20 Q (By Mr. Swichar) I want to know what, what
 21 was said to you that led you to believe that it was a

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1 meeting?
 2 A I've seen some notes.
 3 Q Okay. Whose notes?
 4 A Mr. Gibson's.
 5 Q Okay. What was the -- what were the
 6 circumstances of your seeing those notes?
 7 A Preparation for this.
 8 Q For this deposition?
 9 A Yes.
 10 Q Okay. You didn't see them in connection
 11 with the actual meeting, then?
 12 A Oh, no.
 13 Q Okay.
 14 A No.
 15 Q Do you recall if CCI furnished to you any
 16 documents at that meeting?
 17 A An internal-prepared financial statement on
 18 CCI, possibly a cash flow.
 19 Q Do you recall Mr. Elias saying anything on
 20 the phone at that meeting, participating in any
 21 fashion, by making comments?

30 (Pages 117 to 120)

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1 A Not that I recall.
 2 Q Okay. Where was it left at that meeting
 3 before -- when, when the CCI representative left, had
 4 there been any conclusions reached, or what was said?
 5 What was the next step going to be, at least
 6 before the adjournment of that meeting?
 7 Was anything concluded?
 8 A I don't really recall what was to be
 9 concluded at that point.
 10 Q Okay. Well, do you recall where it was left
 11 at that meeting, what was going to happen next?
 12 A No.
 13 Q Did the bank have any other meeting after
 14 that February 18th meeting without CCI representatives
 15 to discuss the next step?
 16 A Not that I was a part of.
 17 Q But do you recall that there was such a
 18 meeting, even though you were not a part of it?
 19 A No, I do not know if there was a meeting.
 20 Q Okay. Did you take any action as a result
 21 of the meeting?

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1 Were you requested to do anything, or did
 2 you do anything on your own?
 3 A Not that I can recall.
 4 Q At the meeting, do you recall Mr. Ortenzio
 5 being requested to guarantee all or part of the four
 6 million dollar note?
 7 A I do not recall.
 8 Q Either way?
 9 A Either way.
 10 Q Do you recall Mr. Ortenzio requesting the
 11 bank to be patient while it meets -- while CCI meets
 12 with its bonding companies?
 13 A I don't recall.
 14 Q Did Mr. Ortenzio on behalf of CCI request
 15 any additional monies from the bank at that meeting?
 16 A I don't recall.
 17 Q Now, in relation to that meeting, which
 18 we'll say was February 18th, a Friday, do you recall
 19 when the bank froze CCI's accounts?
 20 A I believe it was the next -- during the next
 21 week. I --

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1 Q Let me ask you --
 2 A I'm not exact -- I'm not sure.
 3 Q If the 18th was a Friday, do you have any
 4 recollection?
 5 Were you contacted to do that?
 6 A No, I was not.
 7 Q But you heard about it?
 8 A Yes.
 9 Q And, again, can you tell me the approximate
 10 day or date?
 11 Within how many days of the 18th would you
 12 say?
 13 A Five, six.
 14 Q Okay. Maybe a week, then?
 15 A If that's five or six to you.
 16 Q Well, I want it to be to you, not to me.
 17 MR. GEBHARDT: You've got the witness
 18 guessing. He says he doesn't know.
 19 MR. SWICHAR: I understand.
 20 MR. GEBHARDT: So --
 21 MR. SWICHAR: I'm just trying to

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1 refresh his recollection, but I appreciate your
 2 interruption.
 3 MR. GEBHARDT: No, I mean --
 4 THE WITNESS: That's the best that I
 5 can do.
 6 MR. SWICHAR: Fine.
 7 Q (By Mr. Swichar) Are there any documents
 8 that would tell me the date that the bank froze the
 9 account?
 10 How would I know that? Because I would like
 11 to know that date, and I don't see any documents that
 12 reflect that.
 13 A I don't know.
 14 Q Okay.
 15 MR. SWICHAR: Could you furnish me,
 16 Larry, with any document that would reflect that date?
 17 MR. GEBHARDT: You have all documents
 18 that relate to the termination of the loan --
 19 MR. SWICHAR: I understand --
 20 MR. GEBHARDT: And --
 21 MR. SWICHAR: -- but there's no

31 (Pages 121 to 124)

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1 document that I could find or interpret that would
2 tell me that date. And if there is such a document, I
3 would ask that the bank interpret it for me and just
4 call it to my attention.

5 The alternative is to take all thousand
6 documents and go page by page, which I don't want to
7 do. I assume there's --

8 MR. GEBHARDT: You might take a
9 thousand documents. If something -- I mean, my
10 understanding is that on the Wednesday prior to the
11 declaration of default, the credit line was cut off,
12 and there are some internal memoranda telling people
13 to not honor the checks, and so you have copies of
14 those.

15 MR. SWICHAR: What day -- I'm not
16 questioning you, but if you will help me out, because
17 I know you want to -- what was the date when the
18 declaration -- what was the day of the declaration of
19 default, the 24th?

20 MR. GEBHARDT: The 24th, a Thursday.

21 MR. SWICHAR: Thursday.

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1 And on what day prior to that was there
2 a freezing of the accounts?

3 MR. GEBHARDT: Wednesday afternoon, CCI
4 was called and told that the account was being frozen.

5 MR. SWICHAR: As of that day?

6 MR. GEBHARDT: Yes, sir.

7 MR. SWICHAR: And that was the same
8 with the bouncing of checks?

9 MR. GEBHARDT: Yes. Everything was --
10 that was it.

11 MR. SWICHAR: On the 23rd?

12 MR. GEBHARDT: Right.

13 Mr. Elias is the one that put that into
14 effect.

15 MR. SWICHAR: Okay. That saved me a
16 lot of time.

17 Q (By Mr. Swichar) Now that Mr. Gebhardt has
18 clarified that, were you involved in that process at
19 all?

20 A No.

21 Q Now, there was a subsequent meeting, I'll

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1 represent to you, in Baltimore on February 23rd, 2000.

2 Did you attend that meeting?

3 A No.

4 Q Were you aware of it?

5 A No.

6 Q Did you hear anything about it after the
7 meeting?

8 A No.

9 Q I'm just curious, as the relationship of
10 loan officer, wouldn't they tell you what's going on?

11 It sounds like you didn't really -- really
12 weren't kept informed after the first meeting of the
13 18th.

14 A That is correct.

15 Q Is there a reason for that?

16 A At that point, it was no longer my account.
17 It was not being handled -- I was not to be involved
18 in the account anymore.

19 Q Well, when was that, and how was that
20 decided?

21 A Once Mr. Elias and Mr. Gibson are involved

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1 in an account, we're not involved in accounts anymore.

2 That's standard operating procedure.

3 Q And that would have been right immediately
4 after the meeting of February 18?

5 A Yeah, I don't believe I participated in
6 anything, any decision-making, what was going on
7 there.

8 Q Do you recall when the account was
9 transferred to Workout?

10 A No, I don't.

11 Q Let me help you.

12 I'll show you Schwartz 10, which is a
13 document dated March 3, 3000 (sic), from you to
14 Special Credits, Mr. Gibson, transferring CCI to his
15 area.

16 Does that refresh your recollection?

17 A Yes.

18 Q Was, in fact, it transferred away from you
19 on March 3rd, 3000 (sic)?

20 A Formally.

21 Q Formally.

32 (Pages 125 to 128)

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1 But from on and after the 18th of February,
 2 it had been informally taken away from you?
 3 A Yes.
 4 Q And you weren't kept informed as the point
 5 man or loan officer with CCI as to what was happening?
 6 A An occasional nut as to the specifics.
 7 Generally, I had a little bit idea what was
 8 going on at that time.
 9 Q How did you acquire that idea?
 10 A Phone calls.
 11 Q To whom?
 12 A From.
 13 Q Or from whom?
 14 A To the best that I can recall, Jamin,
 15 Mr. Gibson.
 16 Q And what, would he call you and tell you
 17 what's happening?
 18 A I believe he requested this from me --
 19 Q Did he tell you --
 20 A -- for me to transfer this.
 21 Q Did he tell you on or about, but before the

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1 A Yes.
 2 Q Don't you think as a long-term loan officer,
 3 the point man having the relationship with CCI and
 4 Mr. Ortenzio, you should have known what was going on
 5 and been involved in the process, or at least been
 6 informed?
 7 A Which one of those do you want me to answer?
 8 Q All three, whichever way you want it.
 9 A I was informed of what was going on.
 10 Q Did you agree with what was going on?
 11 A My opinion didn't really matter.
 12 I don't recall if I agreed or if I didn't
 13 agree.
 14 Q So you had no opinion at all?
 15 A None that I issued to anybody.
 16 Q Well, that's not my question.
 17 Did you have an opinion on the propriety of
 18 what the bank was doing, whether or not you issued it
 19 to anybody?
 20 A Yes.
 21 Q What was that opinion?

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1 23rd, that CCI's accounts were going to be frozen?
 2 A On or about.
 3 Q Did you participate in the freezing of those
 4 accounts?
 5 A No.
 6 Q Take any mechanics to do that?
 7 You weren't involved?
 8 A Not that I recall.
 9 Q Okay. Did he tell you why the bank did
 10 that -- was doing that?
 11 A Not that I recall.
 12 Q Did you ever ask?
 13 You knew the bank was freezing the accounts
 14 of your long-time customer, and you never asked what's
 15 going on? Why?
 16 Did you care?
 17 A I don't recall if I asked or if I didn't
 18 ask.
 19 Q Would you --
 20 A Of course, I care.
 21 Q Would you have normally asked?

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1 A I don't recall.
 2 Q But you had an opinion, but you don't
 3 recall?
 4 A Yes.
 5 Q Well, how do you recall you had an opinion
 6 if you don't recall what it was?
 7 A I have an opinion on everything.
 8 Q You have an opinion on today, I assume.
 9 A Possibly, yes.
 10 Q Okay. I want you to be consistent.
 11 So you had an opinion that you kept to
 12 yourself on the propriety of what the bank was doing
 13 to CCI on or about February 23, 2000?
 14 A After the meeting on February 18th, and
 15 those that were in attendance at that meeting, I was
 16 low man on the totem pole.
 17 After that meeting, somebody other than
 18 myself made a decision to proceed what you previously
 19 explained.
 20 I usually do not find out what is done when
 21 an account starts to be handled by Special Credits,

33 (Pages 129 to 132)

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1 Mr. Gibson or Mr. Elias, and the document that, that
 2 is Schwartz 10 was in response to a request by
 3 Mr. Gibson to transfer the CCI account over to him
 4 formally in our computer system.
 5 Q Okay, but that wasn't my question.
 6 My question was, that as the person who had
 7 a longstanding relationship with CCI, even though you
 8 were the low man on the totem pole, you necessarily
 9 would have had an opinion on what the bank was doing,
 10 whether it was proper or not, right?
 11 You said you had an opinion on everything.
 12 A Yes.
 13 Q And the answer is yes.
 14 And as low man on the totem pole, you didn't
 15 want to share that opinion with anyone; is that right?
 16 A My opinion at that point didn't matter.
 17 Q But at the same time, you didn't want to
 18 share it with anyone for the reason that it didn't
 19 matter?
 20 A My opinion didn't matter at that point.
 21 Q Was that the reason you didn't want to share

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1 it with anybody?
 2 A I just chose not to share it with anybody.
 3 Q Okay. Did you agree with what the bank did?
 4 A Yes.
 5 Q Was that your opinion?
 6 A Yes.
 7 Q Okay. In your history as a loan officer,
 8 have you ever approved multiple loans to a single
 9 borrower, such as the relationship with CCI?
 10 Were there other situations where you had
 11 different facilities to a single borrower?
 12 A I have not -- I do not -- did not have the
 13 lending authority to approve.
 14 Q I don't mean approve, but did you ever --
 15 were you ever involved -- I'm sorry, you're right --
 16 were you ever involved in any loan relationships where
 17 there was more than one facility to a single borrower,
 18 such as existed with CCI?
 19 A Customers have more than one borrowing
 20 relationship.
 21 Q And are there situations where a guarantee

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1 would apply to more than one relationship?
 2 A Yes.
 3 Q For example, someone borrowed one million
 4 dollars and the same borrower borrowed three million
 5 dollars, and there would be a guarantee that covered
 6 both facilities; is that fair?
 7 A Yes.
 8 Q And would be -- would you have a situation
 9 where there would be a three million dollar loan and a
 10 one million dollar loan, and there would be a
 11 guarantee of the last one million dollars of both of
 12 those facilities, but limited to one million dollars?
 13 A That could occur.
 14 Q Did it ever occur during your long history
 15 as a loan officer?
 16 A I can't recall.
 17 Q But it's possible it could occur, right?
 18 A Yes.
 19 Q There's no impediment to the bank doing
 20 that; is that right?
 21 A Yes.

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1 Q Who made the decision, if you know, to
 2 declare the default?
 3 Was that Mr. Elias, to make a long story
 4 short, if you know?
 5 A I believe so.
 6 Q Did he talk to you before declaring --
 7 before making the decision to declare the default, did
 8 he ask you your input?
 9 A Not that I recall.
 10 Q Have you ever seen any document at all in
 11 this universe prepared by the bank that analyzes
 12 contemporaneously the material adverse change that
 13 gave rise to the declaration of default by the bank?
 14 A Can you rephrase that?
 15 Q I thought it was pretty good the first time.
 16 A I didn't understand the first time.
 17 Q Have you ever seen any document in this
 18 whole wide world that would constitute an analysis by
 19 the bank of CCI's financial condition that gave rise
 20 to its declaring the default of the loan; i.e., the
 21 material adverse change?

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1 A The note says that.
 2 Q But have you ever seen an analysis done
 3 prior to declaring the default that says here is why
 4 they're in default, here is why there is a material
 5 adverse change that warrants a declaration of a
 6 default?
 7 Banks analyze things --
 8 A Not that I recall.
 9 Q Okay. Would you look at the last exhibit to
 10 the Complaint, sir, Exhibit D, which is Mr. Gebhardt's
 11 letter to CCI declaring the default on February 24,
 12 2000?
 13 Did you review that before it was sent?
 14 A No.
 15 Q Okay. Now, let me ask more specifically.
 16 That letter declares a default on the basis
 17 of a material adverse change in the financial
 18 condition of CCI; is that correct?
 19 A Yes.
 20 Q All right. As the loan officer, are you
 21 able to -- were you able to analyze what that material

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1 and look at that, Schwartz 11.
 2 (Witness complying.)
 3 Q Let me ask the question first, and maybe it
 4 will be easier.
 5 This document reflects that the four million
 6 dollar unsecured line of credit was rated as a number
 7 five risk on a scale of one to ten, is that correct,
 8 as of March 15, 1999?
 9 A Yes.
 10 Q And that's an acceptable risk to the bank?
 11 A Define acceptable.
 12 Q Well, the bank approved the loan, so I'm
 13 assuming it was somewhat acceptable.
 14 A Yes.
 15 Q It was within the parameters of either
 16 making or keeping the loan in existence, right?
 17 A Yes.
 18 Q Okay. What does the number five mean, by
 19 the way, in bank parlance?
 20 A Average.
 21 It's five. It's between one and ten, it's

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1 adverse change was prior to the declaration of
 2 default?
 3 MR. GEBHARDT: You're asking were you
 4 able, or did you?
 5 MR. SWICHAR: Did -- either one.
 6 MR. GEBHARDT: Well, wait a minute.
 7 They're two different --
 8 MR. SWICHAR: I like your question
 9 better.
 10 Q (By Mr. Swichar) Did you?
 11 MR. GEBHARDT: Okay.
 12 A No.
 13 Q Okay. You haven't seen that analysis
 14 anywhere, either, or you don't recall, you said.
 15 A I don't recall.
 16 Q Okay. Presumably, Mr. Gebhardt would have
 17 done that, or he wouldn't have sent the letter, right?
 18 MR. GEBHARDT: Objection.
 19 Q You don't have to answer that one. That was
 20 for my own enjoyment.
 21 Let me show you Schwartz 11. Take a minute

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1 right in the middle.
 2 Q Is that unusual or usual, or there is no
 3 usual or unusual?
 4 A It's average credit risk.
 5 Q Average credit risk.
 6 Now, am I correct in stating that the
 7 1.2 million dollar facility also had a number five
 8 rating risk? Is that correct?
 9 A That, I don't know. I don't recall.
 10 Q Well, if we go back to the 1.2 million
 11 dollar loan approval, or if you look at it now -- go
 12 back and look at S-4 -- see that, about the middle of
 13 the page, where it says new temporary 1.2 million?
 14 A Yes.
 15 Q The 1.2 million facility standing alone also
 16 had an acceptable or average number five credit risk;
 17 is that right?
 18 A On November 3rd.
 19 Q That's right.
 20 Did you maintain a personal desk file with
 21 respect to CCI?

35 (Pages 137 to 140)

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1 A Yes.

2 Q Have you turned that over to Mr. Gebhardt or

3 someone else in connection with this lawsuit?

4 A Yes.

5 MR. SWICHAR: Can I assume it's been

6 turned over, Larry?

7 MR. GEBHARDT: You have it all.

8 MR. SWICHAR: That's all I want to

9 hear, that's fine.

10 I mean, the way the documents came, it

11 was very difficult what came with what.

12 MR. GEBHARDT: I mean, we, we went

13 through this, and we went through it with Judge Rambo.

14 MR. SWICHAR: I'm just asking if we got

15 it, that's all. That's fine.

16 MR. GEBHARDT: I said we made those

17 representations and told you all many times --

18 MR. SWICHAR: If you told me I have his

19 personal desk file, then that's good enough for me.

20 Q (By Mr. Swichar) Would you look at the

21 Complaint?

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1 Do you have that there, S-2?

2 Just -- did you review this Complaint before

3 it was filed?

4 A I'm not sure. I don't recall if I did or if

5 I didn't.

6 Q Did you review it in connection with this

7 deposition?

8 A Yes.

9 Q Okay. Would you look at -- just so I can

10 clarify things again -- would you look at

11 Paragraph 7?

12 And, again, my question is, just so I

13 understand the mechanism of the cash management

14 facility, that any checks written from CCI's account

15 with the bank would increase the four million dollar

16 line of credit borrowings; is that correct?

17 A Yes.

18 Q And so far as you know, CCI had no business

19 accounts elsewhere?

20 A As far as I know, they did not.

21 Q Okay. If -- if CCI wanted to pay a bill

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1 from the accounts receivable that it collects from the

2 account at Allfirst without drawing on the four

3 million dollar line of credit, how could it do that,

4 if it could at all?

5 A One more time, please.

6 Q All right. I'm CCI and I want to pay a

7 bill. I collect my money from the customer, I put it

8 in the account, and I want to pay another bill -- I

9 want to pay a bill, but I don't want it to draw on the

10 line of credit, four million dollar line of credit.

11 How -- could I do that?

12 A I don't think so.

13 Q Is there any document in this world that

14 prohibits CCI specifically from repaying the

15 1.2 million dollar note by drawing on the four million

16 dollar line of credit?

17 A Is there a document that prohibits them?

18 Q Yes, specifically.

19 A Yes, I believe so.

20 Q That prohibits specifically -- is there a

21 specific prohibition?

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1 And if there is, we'll find it.

2 MR. GEBHARDT: You've been provided it.

3 MR. SWICHAR: Pardon me?

4 MR. GEBHARDT: You've been provided it.

5 A I believe it states what the line of credit

6 can be used for, and that is not a use of a line of

7 credit.

8 Q (By Mr. Swichar) All right. Is there any

9 document that deals with how the, how the loan is to

10 be repaid specifically?

11 A No.

12 Q Okay. Is there any document that

13 specifically states it cannot be repaid by writing a

14 check on CCI's business account, checking account?

15 THE WITNESS: Could you read that back?

16 (Question was read by the Reporter.)

17 A Not specifically.

18 Q (By Mr. Swichar) Okay. Now, the loan

19 commitment, which I think you've been chomping at the

20 bit to want to tell me, states that the loan proceeds

21 were to be used to finance accounts receivable and

36 (Pages 141 to 144)

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1 work in progress; is that correct?
 2 A That's correct.
 3 Q Prior to the repayment of the 1.2 million
 4 dollar note in February, on February 11, 2000, were
 5 you aware of CCI ever using the 1.2 million dollar
 6 loan proceeds for any other purpose?
 7 MR. GEBHARDT: For any other purpose?
 8 Q Other than to finance accounts receivable
 9 and work in progress, prior to the repayment.
 10 A I am not aware of any.
 11 Q Okay. In fact, you didn't monitor, you said
 12 earlier; am I right?
 13 You didn't monitor the use of the
 14 1.2 million dollar loan proceeds, did you?
 15 A No.
 16 Q Okay. Are you aware of any reason why the
 17 bank did not put in the commitment letter or in the
 18 1.2 million dollar note or guarantee the express
 19 prohibition that the four million dollar line of
 20 credit could not be used to repay the 1.2 million
 21 dollar note?

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1 MR. GEBHARDT: Objection.
 2 Q You can answer it.
 3 THE WITNESS: Would you read that back,
 4 please?
 5 (Question was read by the Reporter.)
 6 A It was a -- the loan amount for 1.2 million
 7 dollars was for a cash flow shortage situation that
 8 was occurring --
 9 Q (By Mr. Swichar) I understand.
 10 A -- so -- and, also, the line was there to
 11 finance the receivables and work in process.
 12 So the 1.2 million dollars would normally be
 13 paid back after there's no usage on the line because
 14 the receivables had been collected and cash flow is
 15 sufficient to pay back the 1.2 million dollars over
 16 and above the line balance.
 17 Q Where does it say that, other than in your
 18 head?
 19 A It's -- it doesn't say that anywhere.
 20 Q Okay. So let's go back and ask the same
 21 question. I'll say it a little slower this time.

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1 Are you aware of any reason why the bank
 2 couldn't put in the commitment letter for the
 3 1.2 million or in the 1.2 million dollar note or
 4 in the 1.2 million dollar suretyship an express
 5 prohibition that that facility could not be repaid by
 6 drawing down on the four million dollar line of
 7 credit?
 8 A There's no reason the bank could not have
 9 done that.
 10 Q In fact, the loan commitment contains
 11 negative covenants; is that right?
 12 A I believe so.
 13 Q And what's a negative covenant?
 14 A Things that the borrower is not allowed to
 15 do.
 16 Q And the loan commitment and/or the note
 17 contains loan -- negative covenants, correct?
 18 A Yes.
 19 Q Okay. And the bank could have put in a
 20 negative covenant that prohibited the repayment of the
 21 1.2 million from the four million dollar line of

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1 credit; is that correct?
 2 Nothing prohibited that, right?
 3 A Nothing prohibited that.
 4 Q No banking practice that I'm unaware of,
 5 correct?
 6 A No.
 7 Q No regulation or rule somewhere out there
 8 disguised that I'm not aware of?
 9 A Correct.
 10 Q Okay. Is there any request by the bank to
 11 ask Mr. Ortenzio, on Mr. Ortenzio, to guarantee more
 12 than the 1.2 million other than the document we saw
 13 which was for the five million?
 14 A No.
 15 Q Explain to me when and how you learned that
 16 the 1.2 million dollar note had been repaid.
 17 A I received a phone call on the day that the
 18 note was repaid --
 19 Q February 11th?
 20 A -- February 11th -- from Mr. Ortenzio, that
 21 he was going to bring in a check to pay off the

37 (Pages 145 to 148)

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1 1.2 million dollars. I said, okay, fine.
 2 I was out on other business when, when he
 3 came in and presented the payment. I was told about
 4 it when I got back. And --
 5 Q What were you told?
 6 A That Mr. Ortenzio came in and paid off the
 7 1.2 million dollar loan.
 8 Q Okay. What happened next?
 9 Did you take any action of any kind?
 10 A Not that I recall.
 11 Q Well, at a certain point, you returned the
 12 note to him, correct?
 13 A No, I did not.
 14 I returned his surety.
 15 Q Okay. You --
 16 A He was -- yes.
 17 Q Okay. You returned the surety, and we'll
 18 come to that in a minute.
 19 Where did you think the -- what funds did
 20 you think were being used to pay off the 1.2, or you
 21 didn't think about it?

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1 A I don't recall thinking about it.
 2 Q Okay. Frankly, you didn't care.
 3 A I didn't say that.
 4 Q I'm asking.
 5 A Sure, I cared.
 6 Q Well, but you didn't ask, did you --
 7 A No.
 8 Q -- the source of the funds?
 9 A No.
 10 Q But you cared?
 11 A Yes.
 12 Q Why did you care?
 13 A In hopes that their cash flow situation was
 14 back where they said it was going to be at that point;
 15 it was going to be great, we didn't have a big problem
 16 to worry about, and things were going well for them.
 17 Q But you never cared enough to call
 18 Mr. Ortenzio to find out the source of the funds?
 19 A I did not call Mr. Ortenzio.
 20 Q All right. I don't think -- I think we
 21 talked about the loan commitment letter, but I don't

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1 think we marked it, so I just want to confirm that
 2 Schwartz 12 is the -- what I'll call the loan
 3 commitment letter because I know you like that letter.
 4 Let's look at it, and at least tell me that
 5 that is, indeed, the loan commitment letter.
 6 A This is a commitment letter for the four
 7 million dollar line of credit.
 8 Q Okay, that's all.
 9 Would you look at Exhibit S-13, which is
 10 your letter to Mr. Ortenzio at CCI dated February 15,
 11 2000?
 12 A Yes.
 13 Q How did you determine that the 1.2 million
 14 dollar loan had been paid in full as of February 11?
 15 A I looked on the computer.
 16 Q And what did the computer show?
 17 A A zero balance.
 18 Q Okay. Did that computer screen deal only
 19 with the 1.2, or would it have looked at, more
 20 specifically, at the cash management account, the
 21 checking account, the four million dollar line of

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1 credit, et cetera, et cetera?
 2 A Just the 1.2.
 3 Q Okay. But you had the other means of
 4 checking to see what the availability was and the
 5 balance was of the four million?
 6 A I had the means.
 7 Q You chose not to go into that?
 8 A I don't recall if I did or if I didn't.
 9 Q Is it possible you did?
 10 A I don't recall.
 11 Q You don't recall either way?
 12 A Correct.
 13 Q Okay. Was this mailed or hand-delivered,
 14 S-13?
 15 A I don't recall.
 16 Q Did you ever inquire the source of payment?
 17 A No.
 18 Q Okay. Now, when Mr. Ortenzio on behalf of
 19 CCI wrote a check and repaid the 1.2 million dollar
 20 note, he was acting on behalf of CCI as an officer; is
 21 that correct?

38 (Pages 149 to 152)

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1 MR. GEBHARDT: Objection.
 2 A I don't know.
 3 Q Well, he wrote a check as an officer of CCI,
 4 didn't he?
 5 MR. GEBHARDT: Objection.
 6 Q You can answer.
 7 A I don't know who wrote the check.
 8 Q Well, assuming Mr. Ortenzio was responsible
 9 for paying the 1.2 million, who was he acting on
 10 behalf of?
 11 MR. GEBHARDT: Objection.
 12 A I really don't know because I had very
 13 little dealings with the payment of loans from
 14 Mr. Ortenzio through my whole relationship at CCI.
 15 This was the first time Mr. Ortenzio had
 16 made a loan payment that I am aware of.
 17 Q Well, why do you say you had no relationship
 18 with respect to repayment of the loan?
 19 A I said contact.
 20 Q Contact.
 21 Well, how would that be done?

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1 A I -- I dealt with Sheri Phillips --
 2 Q Okay.
 3 A -- on the loan.
 4 Q And would she bring checks in, or --
 5 A No.
 6 Q -- how did it work? What happened?
 7 A They would mail the checks.
 8 Q Okay. Well, how -- why did you say you
 9 dealt with Sheri Phillips, then, if the checks were
 10 mailed?
 11 Were there letters that were signed by her
 12 or what?
 13 A I dealt with Sheri Phillips as far as the
 14 banking relationship.
 15 I didn't specifically say the, the payments.
 16 Q Well, you said you didn't have any
 17 relationship with Mr. Ortenzio in regard to repayments
 18 of loans, you dealt with Sheri Phillips.
 19 So my question is -- is that correct, or do
 20 you want to change your answer?
 21 A That's okay.

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1 Q Okay. When repayments were made by CCI on
 2 account of the equipment note or any other loan
 3 facility, how did they come in?
 4 Were they mailed in, or did Sheri Phillips
 5 hand-deliver them to you, or both?
 6 A No payments ever came directly to me.
 7 Q Okay. Where did they go?
 8 A Either they were mailed in or delivered to a
 9 branch.
 10 Q Okay. Did -- how did you have a
 11 relationship with Sheri Phillips in regard to the
 12 repayment on CCI loans?
 13 A If there was ever a problem with the
 14 payment, that's who I would contact, her.
 15 Q Was there ever a problem?
 16 A I don't recall.
 17 Q Okay. So how else would you have a
 18 relationship with her in connection with repayment,
 19 other than if there was a problem that you don't
 20 recall there ever being a problem?
 21 A If she had a question on the, on the bill,

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1 she would call. When --
 2 Q Sticking to the repayment.
 3 A When we set up the repayment, she would --
 4 we would discuss what the repayment was going to be
 5 on, on the loan.
 6 Q You never had similar conversations with
 7 Mr. Ortenzio?
 8 A No.
 9 Q Okay. Would you look at No. 17,
 10 Paragraph 17, in the Complaint?
 11 A Okay.
 12 Q Do you agree with that allegation?
 13 A Yes.
 14 Q Would you tell me what is meant by a
 15 conditional payment?
 16 MR. GEBHARDT: Objection.
 17 That is -- why don't you go out of the
 18 room while I put this on the record.
 19 MR. SWICHAR: I'll -- I'll change the
 20 question.
 21 That's okay, I'll withdraw the

39 (Pages 153 to 156)

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1 question; save time.
 2 Q (By Mr. Swichar) Are you aware of any facts
 3 that made the payment conditional as alleged in
 4 Paragraph 7?
 5 A No.
 6 Q Am I correct, sir, that both the 1.2 million
 7 dollar note and the four million dollar note and the
 8 1.2 million dollar surety have default provisions?
 9 A Yes.
 10 Q In any of those three documents, and
 11 including the loan commitment letter, is there any
 12 prohibition, or does it make an event of default by
 13 paying the 1.2 million dollar loan off by utilizing
 14 the four million dollar line of credit?
 15 MR. GEBHARDT: Objection to the use of
 16 the compound question.
 17 Prohibition and event of default,
 18 they're two separate --
 19 MR. SWICHAR: I'll strike the
 20 prohibition.
 21 Q (By Mr. Swichar) In any of those documents,

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1 does it state that there is an event of default by
 2 paying the 1.2 million dollar note off by utilizing
 3 the four million dollar line of credit?
 4 A Not in the documents you mentioned.
 5 Q I mentioned the 1.2 million dollar note,
 6 correct?
 7 A Yes.
 8 Q I mentioned the four million dollar note,
 9 correct?
 10 A Yes.
 11 Q I mentioned the loan commitment, and I
 12 mentioned the two million dollar equipment note, or
 13 I'll mention it now because I think that covers
 14 everything.
 15 Do any of those four documents state that it
 16 is an event of default to pay off the 1.2 million
 17 dollar note with the four million dollar line of
 18 credit?
 19 A No, they do not.
 20 Q Is there any document in this universe that
 21 you're aware of that states that the 1.2 million

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1 dollar note cannot be paid off unless the four million
 2 dollar note is paid off first?
 3 A No.
 4 Q Are you aware of any banking practice,
 5 custom, or regulation that would act as an impediment
 6 to the bank stating in any loan document that the
 7 1.2 million dollar note could not be paid off until --
 8 unless and until the four million dollar note is paid
 9 off first?
 10 A I am not aware of any.
 11 Q Are you aware of any banking practice, rule,
 12 or regulation or other impediment that would have
 13 prohibited the bank from requiring a guarantee of the
 14 last one million dollars in CCI's indebtedness,
 15 whether it be the four million dollar line or the
 16 1.2 million dollar note, or the two million dollar
 17 equipment loan?
 18 A I am not aware of any.
 19 Q Are you aware of any banking regulation,
 20 policy, or rule or regulation or other impediment
 21 which would have prevented the bank from stating that

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1 the 1.2 million dollar line had to be paid from funds
 2 other than collected accounts receivable or other
 3 business deposits of CCI?
 4 A I'm not aware of any.
 5 Q Now, when the 1.2 million dollar facility
 6 was deposited in CCI's account, I think you testified
 7 earlier that that would have had the financial impact
 8 of decreasing the balance on the four million dollar
 9 line of credit; is that correct?
 10 A Yes.
 11 Q And it would have also had the impact
 12 financially of increasing the availability on the four
 13 million dollar line of credit; is that correct?
 14 A Yes.
 15 Q And that would have occurred in November,
 16 1999, if I recall correctly?
 17 A Yes.
 18 Q Now, when the 1.2 million dollar note was
 19 repaid by drawing on the four million dollar line of
 20 credit in February, 2000, that, in effect, reversed
 21 that which had previously occurred when the

40 (Pages 157 to 160)

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1 1.2 million dollar loan was deposited in CCI's bank
 2 account a few months earlier; is that correct?
 3 MR. GEBHARDT: Objection.
 4 A It increased the line.
 5 Q It had the same impact; it reversed the
 6 impact of what occurred earlier when the 1.2 million
 7 dollar loan -- I could go through the numbers again,
 8 but I don't think I have to, do I?
 9 A No.
 10 Q It really just reversed what had occurred
 11 when the 1.2 million dollar loan had been granted and
 12 deposited?
 13 A It increased the outstanding on the four
 14 million dollar line.
 15 Q The answer to my question is yes, it was a
 16 reversal?
 17 A No, it wasn't a reversal. It increased the
 18 outstanding on the line at that time.
 19 Q Okay. At any time in the history of CCI's
 20 relationship with the bank, did it ever exceed the
 21 four million dollar cap?

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1 A I don't recall.
 2 Q Okay. Are there documents -- and I know
 3 your attorney will say I got them, but I don't think I
 4 did -- that would show me if deposits that were made
 5 by CCI to its checking account for, let's say the
 6 months prior to the closing of the account, February,
 7 2000?
 8 A Are there --
 9 Q Documents that reflect deposits made, the
 10 amount of deposits made.
 11 A Their checking accounts.
 12 Q Their checking account statements?
 13 A Checking account statements.
 14 Q And the bank would have copies of those
 15 documents as well?
 16 A Yes.
 17 Q Okay.
 18 MR. GEBHARDT: As do you.
 19 MR. SWICHAR: Pardon me?
 20 MR. GEBHARDT: As do you.
 21 As do you.

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1 MR. SWICHAR: How do I have them?
 2 MR. GEBHARDT: Because you have with
 3 Mr. Chernicoff, the same way --
 4 MR. SWICHAR: I'm assuming that they're
 5 out there somewhere. I just wanted to make sure if
 6 there's anything else other than the checking account
 7 statements.
 8 Q (By Mr. Swichar) Would you look at
 9 Paragraph 34 of the Complaint?
 10 Let me know when you're done reading it.
 11 (Witness reading.)
 12 A Okay.
 13 Q Did Mr. Ortenzio ever make any direct
 14 representation to you that the 1.2 million dollar loan
 15 facility would not be paid from the four million
 16 dollar line of credit, it would come from other funds?
 17 A No.
 18 Q Are you familiar with the practice --
 19 MR. SWICHAR: Let's stop for a minute.
 20 (Discussion off the record.)
 21 Q (By Mr. Swichar) Are you familiar in reading

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1 the Complaint, do you recall that as part of the
 2 Complaint there was a preference action that's been
 3 filed against the bank by the debtor, CCI?
 4 A I am aware of that.
 5 Q Okay. And are you aware that this lawsuit
 6 against Mr. Ortenzio seeks indemnification of the
 7 preference in the event the bank is required to
 8 reimburse CCI of that preference claim?
 9 MR. GEBHARDT: That's not an accurate
 10 statement.
 11 Q Are you aware that the bank --
 12 MR. SWICHAR: I never could figure out
 13 that part of the Complaint.
 14 MR. GEBHARDT: Well, let me -- why
 15 don't I because --
 16 MR. SWICHAR: Why don't you do it.
 17 MR. GEBHARDT: -- Mr. Burke had some
 18 questions about that, too.
 19 The maximum amount the bank is seeking
 20 to recover is the 1.2 million dollars that was
 21 guaranteed plus the costs of collection.

41 (Pages 161 to 164)

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1 Because of the three payments that came
2 in at or about the time of the default, the line of
3 credit was reduced so that the principal balance was
4 somewhere in the area of three hundred thousand
5 dollars.

6 If those payments do not have to be
7 returned as preferences and are truly pay-downs of the
8 line of credit, then that's what the bank is seeking.

9 But to the extent a preference recovery
10 is made, the bank intends to recover the amount of the
11 preference recovery up to a ceiling of the 1.2 million
12 dollars because that is the limit of the guarantee
13 that Mr. Ortenzio gave.

14 MR. SWICHAR: Thank you.

15 MR. GEBHARDT: So -- I mean, that's --

16 MR. SWICHAR: I appreciate that.

17 Q (By Mr. Swichar) Do you understand that?

18 A Yes.

19 Q Okay. Now, the payments that constitute the
20 preference payments constitute monies that were swept
21 from CCI's checking account to the bank, by and to the

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1 MR. SWICHAR: I understand. I'm not
2 arguing about the preference aspects.

3 I'm only trying to figure out the
4 mechanism by which the monies went to the bank, and
5 that was via the sweep that the bank would make in
6 some fashion from the checking account of CCI to the,
7 to the bank.

8 The bank swept those monies out.
9 Whether it's in the routine ordinary course or
10 whatever, I don't care, but is that correct?

11 MR. GEBHARDT: I mean, I guess.

12 You know, I'm not quite sure what
13 you're asking, or what I'm doing here --

14 MR. SWICHAR: It wasn't a situation
15 where Mr. Ortenzio or someone from CCI said --

16 MR. GEBHARDT: Do it, no.

17 MR. SWICHAR: -- do it --

18 MR. GEBHARDT: No.

19 MR. SWICHAR: -- here's the money, do
20 it?

21 MR. GEBHARDT: No.

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1 bank; is that correct?

2 MR. GEBHARDT: There were payments that
3 were sent in by customers directly and, in accordance
4 with the normal mechanisms, were applied against the
5 line.

6 MR. SWICHAR: Okay, but those were
7 payments by CCI's customers and deposited in CCI's
8 checking account, correct?

9 MR. GEBHARDT: Whatever the collection
10 account was.

11 MR. SWICHAR: Yeah -- well, there was
12 only one checking account, so it would have gone into
13 the checking account; is that correct?

14 MR. GEBHARDT: I guess that's how they
15 set it up.

16 MR. SWICHAR: And the way the monies
17 went to the bank that constitute the alleged
18 preference payments is that the bank swept those
19 monies from the checking account of CCI to the bank.

20 MR. GEBHARDT: That was done every day
21 during the entire relationship.

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1 He had no part in it.

2 MR. SWICHAR: Okay. He had no --

3 MR. GEBHARDT: We're not contending he
4 had any part --

5 MR. SWICHAR: Okay. The bank had no
6 part --

7 MR. GEBHARDT: Mr. Ortenzio.

8 MR. SWICHAR: -- I'm sorry --

9 Mr. Ortenzio had no part in the payment of those
10 preference, alleged preference payments to the bank.

11 MR. GEBHARDT: Other than --

12 MR. SWICHAR: Other than it was his
13 checking account that was --

14 MR. GEBHARDT: It was the company's
15 checking account that authorized that procedure.

16 MR. SWICHAR: Okay.

17 Q (By Mr. Swichar) Would you look at
18 Schwartz 14, Mr. Schwartz, which I'm about to give
19 you?

20 I have one very simple question. Were you
21 involved in the preparation of S-14, which is an

42 (Pages 165 to 168)

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1 Allfirst charge-off memo?
 2 A No.
 3 Q Do you know the reasons for the bank's
 4 declaring the default on February 24?
 5 A No.
 6 Q Okay. I'll leave this out, save that for
 7 Mr. Elias.
 8 If the bank had collected one million
 9 dollars from its customers and deposited it in a rival
 10 bank, in another bank, and you knew about that, what
 11 would you have done?
 12 MR. GEBHARDT: If the bank had
 13 collected --
 14 Q I'm sorry.
 15 If CCI had collected one million dollars
 16 from its customers in the ordinary course and put it
 17 in another bank and you found out about it, is that a
 18 permissible or impermissible act?
 19 MR. GEBHARDT: Objection.
 20 A I don't think it was -- would -- could be
 21 deemed as permissible or impermissible.

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1 I would have asked why, what the purpose
 2 was.
 3 Q Well, I'm trying to figure out what the
 4 intent of the obligation was where the bank -- where
 5 CCI was required to make its primary business deposits
 6 at Allfirst.
 7 So in that context, if CCI had said, well, I
 8 have a million dollars in checks, I'm going to deposit
 9 that money somewhere else, in another bank, would you
 10 have considered that a breach of that obligation?
 11 A Yes.
 12 Can I rephrase that?
 13 Q Sure.
 14 A I don't think that was a breach.
 15 I would have inquired as to why they were
 16 doing that. I mean, a lot of customers do have
 17 accounts at other banks. Their operating account
 18 where the transactions occur day-to-day --
 19 Q Is there a similar --
 20 A -- is meant by primary deposit account.
 21 Q I'm sorry, what?

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1 A The account where checks that they use to
 2 conduct business --
 3 Q Right.
 4 A -- on a day-to-day basis --
 5 Q Right.
 6 A -- and their primary account would be the
 7 one tied to cash management.
 8 If they have an account at another bank --
 9 customers do do that -- it wouldn't be a breach.
 10 Q Well, suppose they were collections from
 11 customers, and they had an obligation such as the one
 12 that CCI had and they put that money in another bank
 13 and the borrower used it to buy an airplane.
 14 A I would inquire as to why they're doing
 15 that.
 16 Q I'm using it to buy an airplane.
 17 A Why isn't the money coming back into the
 18 business?
 19 Q Well, would you have considered that a
 20 breach?
 21 A A breach --

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1 Q In your view, a permissible act.
 2 MR. GEBHARDT: Objection.
 3 MR. SWICHAR: I'll withdraw the
 4 question. It's a fair objection.
 5 Larry, are you -- I'm asking you
 6 outright, and I almost hope the answer is yes -- are
 7 you planning to use Mr. Schwartz as an expert at the
 8 trial?
 9 I think I'm entitled to know that.
 10 MR. GEBHARDT: Well, as I mentioned,
 11 depending on -- if you plan to have someone take the
 12 stand that says, and testify as an expert, that it is
 13 ordinary banking custom and practice to repay a
 14 guaranteed loan facility with the proceeds of an
 15 unsecured, unguaranteed line of credit in a situation
 16 where the borrower is in default, I may ask
 17 Mr. Schwartz if that's his understanding of banking
 18 custom and practice, but I have no intention of
 19 necessarily calling him in my case in chief as an
 20 expert.
 21 Q (By Mr. Swichar) Mr. Schwartz, are you aware

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1 of any custom or practice in the banking industry that
2 requires a borrower to repay a guaranteed loan with
3 funds other than -- which prohibits a borrower from
4 repaying a guaranteed loan from a draw on a
5 nonguaranteed loan?

6 MR. GEBHARDT: Objection.

7 Custom and practice is not a law.

8 MR. SWICHAR: Well, I'm using your
9 quote. I wrote it down when you said ordinary banking
10 custom and practice.

11 MR. GEBHARDT: Right, but you're saying
12 is there a custom and practice that prohibits.

13 MR. SWICHAR: Yes.

14 MR. GEBHARDT: Well, banking customs
15 and practices don't prohibit anything. They're not
16 law. They're how --

17 MR. SWICHAR: I'm asking -- I think the
18 whole banking custom or practice would be irrelevant
19 in this case, but you brought it up.

20 MR. GEBHARDT: It's your expert --

21 MR. SWICHAR: You said you may use him

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1 EXAMINATION BY COUNSEL FOR THE PLAINTIFF

2 BY MR. GEBHARDT:

3 Q Mr. Schwartz, this particular four million
4 dollar line of credit was, as I think the testimony
5 has been and is reflected in the note, was tied to a
6 cash management facility, right?

7 A Yes.

8 Q And the cash management facility would kick
9 in basically at the end of each day, right?

10 A Yes.

11 Q And would I be correct that one would take
12 the total number of checks and deposits that came in
13 to the credit of CCI and then compare them to the
14 total number of checks that CCI had issued and that
15 were presented to the bank for payment on each day?

16 A Yes.

17 MR. SWICHAR: Well, I object because I
18 don't know if the computer made that comparison. I
19 think it works differently.

20 MR. GEBHARDT: Well, I'm asking the
21 witness.

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1 for that purpose if I use him, so I'm --

2 MR. GEBHARDT: Your expert --

3 MR. SWICHAR: -- hypothetically asking
4 him the question.

5 Q (By Mr. Swichar) Are you aware of any
6 banking custom or practice which prohibits a borrower
7 from paying off a guaranteed loan from a loan that is
8 not guaranteed?

9 A Not to my recollection.

10 Q Okay. Would your answer change if I said to
11 you are you aware of any banking practice or custom
12 that prohibits a borrower from paying off a guaranteed
13 loan with -- from a nonguaranteed line of credit if it
14 is in financial distress?

15 MR. GEBHARDT: Objection.

16 A Not to my recollection.

17 Q All right.

18 MR. SWICHAR: Well, I'm done.

19 MR. GEBHARDT: I have some questions.

20 MR. SWICHAR: Sure.

21 ----

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1 MR. SWICHAR: Yeah, but you're telling
2 the witness.

3 So why don't you just ask him questions
4 how it works?

5 Q (By Mr. Gebhardt) If there was a greater
6 number of checks presented for payment than there were
7 deposits received, what would be the effect?

8 A A draw on the line of credit.

9 Q Suppose there was an excess of checks
10 received to the credit of CCI's account over items
11 presented for payment?

12 A A payment on the line of credit.

13 Q And suppose the line of credit had been
14 fully repaid?

15 A An investment would occur.

16 Q So there would be a positive balance in
17 CCI's account?

18 A Yes.

19 Q And what would happen -- would that positive
20 balance earn interest?

21 A Yes.

44 (Pages 173 to 176)

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1 Q And do you recollect whether under the terms
2 of the line of credit CCI was required to have the
3 line of credit at a zero balance for thirty
4 consecutive days in a twelve-month period?
5 MR. SWICHAR: Could I hear that back?
6 (Question was read by the Reporter.)
7 MR. SWICHAR: I don't understand the
8 question, but if your own witness does, fine.
9 And if there is a document, why don't
10 you just show it to him?
11 MR. GEBHARDT: Actually, I will
12 withdraw the question because the March 23rd, 1999,
13 commitment does not have that as a requirement, but
14 the preceding one did.
15 So we're operating under what's been
16 designated Schwartz 12, so I will withdraw the
17 question.
18 Q (By Mr. Gebhardt) Now, turning to Schwartz
19 Exhibit 12, which is the commitment letter for the
20 four million dollar revolving line of credit, what
21 were the proceeds of draws on the line of credit to be

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1 I'm just objecting.
2 MR. GEBHARDT: Then object.
3 Q (By Mr. Gebhardt) The line of credit was
4 intended to permit CCI to have funds available pending
5 the receipt of payment from customers on the accounts
6 receivable?
7 A Yes.
8 Q You were asked some questions relating to
9 the payment of the monthly installments on the two
10 million dollar equipment term loan.
11 Do you recollect those?
12 A Yes.
13 Q And I think your testimony was that they
14 were made through the use of the revolving, four
15 million dollar revolving line of credit, right?
16 A Yes.
17 MR. SWICHAR: No, I don't think he said
18 that.
19 I think he said the repayments were
20 made either through checks or automatic, and then we
21 went to the next step, which was the impact of it.

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1 used to do?
2 A Finance work in process and accounts
3 receivable.
4 Q Is repaying in full any fully funded loan or
5 credit facility an authorized use of loan proceeds?
6 MR. SWICHAR: I object to the form of
7 the question.
8 Q You may answer.
9 THE WITNESS: Read it back, please.
10 (Question was read by the Reporter.)
11 MR. SWICHAR: I object to the form,
12 particularly the word authorized.
13 A No.
14 Q (By Mr. Gebhardt) Okay. Now, what exactly
15 are accounts receivable?
16 A Payments from customers of the borrower for
17 services rendered.
18 Q Okay. And this line of credit was intended
19 to provide CCI with --
20 MR. SWICHAR: Are you just leading him
21 down?

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1 Q Was making the monthly installments of
2 principal and interest on the equipment term loan an
3 authorized use of the four million dollar revolving
4 line of credit?
5 A Yes.
6 Q Why is that?
7 A Because a term loan is to be repaid, of
8 course, over a period of time, monthly, and through
9 profits of the company, and those profits are a part
10 of the receivables that they come in. So that line is
11 used because that -- the profits are in -- a part of
12 the accounts receivable, and the line gets paid down
13 that way.
14 (Gerard L. Elias entered the conference
15 room.)
16 Q Had there been no term loan from CCI --
17 no -- excuse me, let me rephrase that.
18 Assume there had been no four million dollar
19 line of credit, what would the source of payment have
20 been for CCI to repay the monthly installments of
21 principal and interest on the two million dollar

45 (Pages 177 to 180)

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1 equipment loan?

2 MR. SWICHAR: Objection as to form.

3 A Excess cash flow.

4 Q Where would that come from?

5 A The collection of accounts receivable.

6 Q Okay. Now, when the 1.2 million dollar loan

7 was paid off on February 11, 2000, with a draw on the

8 four million dollar revolving line of credit, I

9 believe the testimony has been that a check was

10 delivered by Mr. Ortenzio to make that payment.

11 Does that accord with your recollection?

12 A Yes.

13 Q Was that payment delivered directly to you?

14 A No.

15 Q Were you at any time ever told by anyone at

16 or about February 11, 2000, that that check

17 represented a draw on the four million dollar

18 revolving line of credit?

19 A No.

20 Q Had you known on or about February 11, 2000,

21 that the check presented by Mr. Ortenzio on behalf of

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1 CCI represented a draw on the four million dollar

2 revolving line of credit, what action, if any, would

3 you have taken?

4 A I would have not honored the check.

5 Q If Mr. Ortenzio had called you prior to

6 bringing the check in and expressly stated that he

7 intended to pay the 1.2 million dollar loan with a

8 draw on the four million dollar revolving line of

9 credit, what would your response to Mr. Ortenzio have

10 been?

11 MR. SWICHAR: Objection to form.

12 A No, don't bother, or why are you paying it

13 off with the line?

14 Q Now, when the --

15 MR. SWICHAR: Do you want the answer to

16 that?

17 Q When the 1.2 million dollar line of

18 credit -- excuse me -- when the 1.2 million dollar

19 loan was discussed, what did Mr. Ortenzio tell you was

20 the reason CCI needed that advance of funds?

21 A They needed the money to keep operating

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1 because the cash flow situation of the company was in

2 a depo -- disposition.

3 Q Did Mr. Ortenzio express at all how long he

4 believed that cash flow problem would continue?

5 A I believe some cash flow projections given

6 to us indicated February, through the end of February.

7 Q And from what source based on your

8 discussions with Mr. Ortenzio in November of 1999 did

9 you anticipate the 1.2 million dollar loan being

10 repaid?

11 A Excess cash flow.

12 Q Okay. And based on Mr. Ortenzio's

13 discussions, did you expect that excess cash flow to

14 put CCI in a positive cash position?

15 A Yes.

16 Q And would you have expected at the time of

17 the 1.2 million --

18 MR. SWICHAR: Object to all these

19 leading questions.

20 MR. GEBHARDT: That's fine.

21 Q (By Mr. Gebhardt) Would you have expected

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1 the 1.2 million dollar loan had it been repaid from

2 the excess cash flow for there to have been a positive

3 balance on the four million dollar revolving line of

4 credit?

5 A I would have expected the line to have a

6 zero balance.

7 Q Now, you were asked --

8 MR. SWICHAR: Wait.

9 Can I hear that question and answer

10 back again?

11 (Record was read by the Reporter.)

12 Q (By Mr. Gebhardt) Now, I believe the

13 documents establish based on the commitment letters

14 that the 1.2 million dollar loan was to be due on

15 March 31, 2000, if not demanded sooner, and that the

16 four million dollar line of credit expired on

17 April 30, 2000.

18 What was your anticipation of what would

19 occur had CCI Construction not had sufficient cash

20 flow to repay the 1.2 million dollar loan by March 31,

21 2000?

46 (Pages 181 to 184)

Craig J. Schwartz

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1 MR. SWICHAR: Same objection; both
2 leading and speculative.
3 A We would have reviewed the situation and
4 determined what our further action would be at that
5 time.
6 Q And what kind of further actions or options
7 would have been available to the bank at that time?
8 MR. SWICHAR: Same objections.
9 A Additional collateral, restructure of the
10 debt.
11 Q Okay. Now, you were asked some questions
12 about material adverse change in the financial
13 circumstances of CCI.
14 In February of 19 -- or excuse me -- in
15 February of 2000, would you as CCI's account officer
16 have regarded a six million dollar loss for the fiscal
17 year ending December 31, 1999, to have been a material
18 adverse change in CCI's financial situation?
19 A Yes.
20 Q Would you have regarded a million dollar
21 negative shareholder equity as of December 31, 1999,

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1 as being a material adverse change in CCI's financial
2 circumstances?
3 A Yes.
4 Q Okay. Do you know whether the suretyship --
5 do you know whether the 1.2 million dollar promissory
6 note contained a material adverse change default
7 provision?
8 MR. SWICHAR: Objection to form; speaks
9 for itself.
10 A Yes, I believe it does.
11 Q Okay. If you would like to, take a look at
12 Mr. Ortenzio's suretyship document, suretyship
13 guarantee.
14 Do you have that in front of you -- okay,
15 it's an exhibit.
16 Do you know whether the suretyship provided
17 that Mr. Ortenzio would be in default if there was a
18 material adverse change in the financial circumstances
19 of CCI?
20 MR. SWICHAR: Objection as to form; the
21 document speaks for itself.

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1 Q You may answer.
2 A Yes, I believe it does.
3 MR. SWICHAR: Do you want to point to
4 that provision while we're at it?
5 MR. GEBHARDT: You've got these in the
6 Complaint, don't you?
7 MR. SWICHAR: Okay, let's go on. I'll
8 accept it.
9 I'll accept it, Larry.
10 Q (By Mr. Gebhardt) Why don't you read it out
11 verbally, Mr. Schwartz?
12 I think it's --
13 MR. SWICHAR: It goes down to G.
14 MR. GEBHARDT: Exactly.
15 Q (By Mr. Gebhardt) Material adverse change in
16 the financial condition of the borrower or the
17 undersigned.
18 And would I be correct that carrying down on
19 the page there's an authorization for the bank in its
20 sole discretion without notice to collect the
21 guaranteed sums directly from the person giving the

Page 188

1 suretyship, and that's in the paragraph next to the
2 last from the bottom?
3 A Yes.
4 Q Now, if we assume that CCI had a six million
5 dollar loss for fiscal year 1999 and had a negative
6 shareholders equity of one million dollars, would you
7 have regarded there to have been a default under the
8 1.2 million dollar loan and Mr. Ortenzio's suretyship
9 at the time the check was presented in payment of that
10 obligation under -- by a draw on the four million
11 dollar line of credit?
12 MR. SWICHAR: I object.
13 Mr. Schwartz has already testified that
14 he was totally uninvolved in the default issues
15 involved in this case, but go ahead, answer it.
16 Q If you had known -- if you had personally
17 known of the financial circumstances of CCI on
18 February 11, 2000, the day Mr. Ortenzio brought the
19 check in, would you have regarded at that moment
20 Mr. Ortenzio and CCI to have been in default?
21 A Yes.

47 (Pages 185 to 188)

Craig J. Schwartz

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1 Q Now, I think you indicated that you did not
2 know when you spoke with Mr. Ortenzio on or about
3 February 11 what the source of the payment might have
4 been that repaid the 1.2 million dollar loan.
5 A That's correct.
6 Q Do you know whether, based on your activity
7 as an account officer, whether Mr. Ortenzio had the
8 personal financial ability to have made that payment?
9 MR. SWICHAR: Objection as to form.
10 A Yes, I believe he did.
11 Q Did you know for a fact whether CCI had
12 accounts with any other banks at the time?
13 A I was not aware of any.
14 Q But did you know one way or the other?
15 A No.
16 Q Did you know whether CCI was into the line
17 of credit at the time the payment was made?
18 MR. SWICHAR: Objection.
19 I don't know what that means, into the
20 line of credit.
21 Q Had a positive balance on the line of credit

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1 at the time the 1.2 million dollar payment was made.
2 Did you know that on February 11?
3 A No, I did not.
4 Q Now, after you learned that the check had
5 come in, did you have any contact with Mr. Ortenzio
6 about the consequences of the payment having been
7 made?
8 In other words, why did you send this letter
9 that's been marked as S-13 to Mr. Ortenzio confirming
10 that the 1.2 million dollar line had about --
11 MR. SWICHAR: Objection as to form; the
12 letter says why he sent it.
13 Q That's 13.
14 Why did you send that letter, S-13?
15 MR. SWICHAR: Objection as to form.
16 It states on the letter why he was
17 sending it.
18 A As a follow-up to Mr. Ortenzio's request to
19 get his surety back because, because the loan was paid
20 in full.
21 Q Okay. Now, that was a request made to you

Page 191

1 directly?
2 A Yes.
3 Q And was any sense of urgency expressed by
4 Mr. Ortenzio in the call requesting the return of the
5 suretyship?
6 A Yes, it would have had to be for me to go
7 through the process to get the surety back quicker
8 than the normal course of business.
9 MR. SWICHAR: That's not responsive.
10 I object to the answer, form of the
11 answer.
12 Q Did you take action to get it back quicker
13 than the normal ordinary process?
14 MR. SWICHAR: He testified he had no
15 recollection.
16 Objection.
17 Q You may answer.
18 A Yes, I have -- I did.
19 Q And why did you take that extra effort?
20 A Mr. Ortenzio's request.
21 Q You were also asked a couple questions about

Page 192

1 banking custom and practice.
2 Do you recollect that?
3 A Yes.
4 Q Do you know whether banking customs and
5 practice are binding law, enforceable --
6 MR. SWICHAR: Objection to the
7 question.
8 Q -- in courts?
9 A No, I do not.
10 Q Do you know whether banking customs and
11 practices constitute a prohibition upon borrower
12 conduct?
13 A No, I do not.
14 MR. GEBHARDT: No further questions.
15 MR. SWICHAR: Just a couple.
16 EXAMINATION BY COUNSEL FOR THE DEFENDANT
17 BY MR. SWICHAR:
18 Q Mr. Schwartz, you testified that the
19 repayment in full of the 1.2 million dollar loan was
20 not an authorized use of the four million dollar line
21 of credit; is that correct?

48 (Pages 189 to 192)

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Craig J. Schwartz

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1 A Yes.

2 Q Is there any document anywhere in this world

3 that states specifically in regard to repayment in

4 contrast to use of the funds that the funds -- that

5 the four million dollar line could not be used to

6 repay the 1.2?

7 A There's no documents that says it cannot be

8 used to repay it.

9 Q Is there any -- would there have been any

10 impediment that you're aware of to the bank stating in

11 any document binding on Mr. -- binding on CCI or

12 Mr. Ortenzio to prohibit the four million dollar line

13 of credit to be used to repay the 1.2 million dollar

14 loan, such as we discussed earlier, a negative

15 covenant?

16 A Other than the agreed-upon use of proceeds

17 of that four million dollar loan.

18 Q Right, right.

19 Is there any impediment to the bank

20 expressly stating as a negative covenant that the four

21 million dollar line of credit could not used to repay

Page 195

1 reason --

2 MR. SWICHAR: I'll ask another

3 question.

4 Q (By Mr. Swichar) Are you aware of any

5 impediment that prevented the bank from stating in any

6 document binding on CCI or Mr. Ortenzio that the

7 1.2 million dollar loan could only be repaid from

8 excess cash flow or profits?

9 A No.

10 Q You testified with respect to the equipment

11 note that that was a term loan; is that correct?

12 A Yes.

13 Q Is that different than the 1.2 million

14 dollar loan?

15 A Yes.

16 Q Okay, because payments were to be made

17 monthly?

18 A The whole nature of the transaction was

19 different.

20 Q The equipment note?

21 A Yes.

Page 194

1 the 1.2 million dollar loan?

2 A No.

3 Q The answer's no?

4 A No.

5 Q How was CCI to repay the 1.2 million dollar

6 loan?

7 A From excess cash flow.

8 Q And I think we -- I asked you earlier, but

9 correct me if I'm wrong, since Mr. Gebhardt asked,

10 touched on that, where is that in any document?

11 A I don't believe it's in a document.

12 Q Okay. Is there any reason or any impediment

13 to the bank not putting that in any document that this

14 loan could only be repaid from excess cash flow or

15 excess profits?

16 MR. GEBHARDT: Let me object to, again,

17 the compound nature. Reason and impediment are two

18 different things.

19 MR. SWICHAR: I'm using his word -- I

20 hear you.

21 MR. GEBHARDT: You're asking is there a

Page 196

1 Q Okay. You testified that payments on the

2 equipment note had to be repaid through profits of the

3 company, from collected accounts receivable, if I took

4 notes correctly; is that correct?

5 A Yes.

6 Q Is that stated anywhere in the equipment

7 note or any related document?

8 In other words, limiting the monies that can

9 be used to repay the equipment note.

10 A Not that I'm aware of.

11 Q You testified when the 1.2 million dollar

12 note was repaid on February 11 you were not aware that

13 the payment had been made from a draw on the four

14 million dollar line of credit; is that correct?

15 A Yes.

16 Q That information was readily available to

17 you, was it not?

18 A Within a day or so.

19 Q Within a day or so?

20 A Yes.

21 Q Wouldn't that information have been on your

49 (Pages 193 to 196)

Craig J. Schwartz

Page 197

1 computer?
 2 A Not until the payment actually gets posted.
 3 Q Okay. The next day?
 4 A Possibly.
 5 Q Okay. Certainly before the note was
 6 returned?
 7 A Yes.
 8 Q And marked satisfied?
 9 A Yes.
 10 Q You had the opportunity to learn the source
 11 of payment?
 12 A The note was not returned.
 13 Q The note, the guarantee, the suretyship.
 14 A Yes.
 15 Q Prior to your delivery of the guarantee
 16 marking it paid, you had the opportunity to determine
 17 the source of the money, is that correct -- source of
 18 the payment -- is that correct?
 19 A Yes.
 20 Q And you never inquired as to the source of
 21 the money -- source of the repayment of the

Page 198

1 1.2 million dollar loan; is that correct?
 2 A Yes.
 3 Q And, again, where did you think the money
 4 came from?
 5 And I think your earlier answer was you
 6 didn't know, you didn't care; is that correct?
 7 MR. GEBHARDT: Objection to the
 8 characterizing of the witness' earlier testimony.
 9 A I didn't know where the money came from.
 10 Q Well, you didn't ask, did you?
 11 A No, I did not.
 12 Q And, therefore, you didn't care, did you?
 13 MR. GEBHARDT: Objection.
 14 Q If you had cared, you would have asked; is
 15 that right?
 16 A I didn't have the opportunity to speak to
 17 Mr. Ortenzio.
 18 Q You could have called him on the phone?
 19 A I -- that's correct.
 20 Q Could have gone over to CCI and knocked on
 21 the door and asked him?

Page 199

1 A Yes.
 2 Q Okay. You didn't do either, did you?
 3 A No.
 4 Q If you had cared, you would have done it?
 5 MR. GEBHARDT: Objection.
 6 A Most likely.
 7 Q The fact is when the 1.2 million dollar note
 8 was repaid, you were just happy to see that it was
 9 repaid, weren't you?
 10 A I don't think I'd put it in those words.
 11 Q Were you glad or sad --
 12 A When I get --
 13 Q -- or something in between?
 14 A When I receive payment, I'm always --
 15 Q Grateful?
 16 A Yes.
 17 Q Okay. Now, Mr. Ortenzio told you you said
 18 in November, 1999, that he required the 1.2 million
 19 through the end of February, 2000; is that correct?
 20 That's what you stated when your attorney
 21 asked you.

Page 200

1 A Okay.
 2 Q Is that correct?
 3 A That was --
 4 Q You said they would need the money, the
 5 extra money, the 1.2 million, through the end of
 6 February, 2000.
 7 A That was according to the cash flow
 8 statements.
 9 Q And that's what Mr. Ortenzio told you,
 10 right?
 11 A Yes.
 12 Q Okay. Now, at the time of the repayment of
 13 the 1.2 million coincidentally in February, 2000, the
 14 balance on the four million dollar line of credit
 15 allowed for the repayment of the 1.2 from the four
 16 million; is that correct?
 17 MR. GEBHARDT: Objection.
 18 Q There was sufficient cushion there under the
 19 four million dollar line of credit to repay the 1.2;
 20 is that correct?
 21 We went over the numbers.

50 (Pages 197 to 200)

Craig J. Schwartz

Page 201

1 A Yes.
 2 Q If you want, we can do it again.
 3 Am I correct?
 4 A Yes.
 5 Q There was sufficient money, substantially --
 6 A There was availability on the line of
 7 credit.
 8 Q Yes.
 9 And how much was that availability?
 10 It was greater than the 1.2 million, wasn't
 11 it?
 12 A Yes.
 13 Q We went over the numbers earlier.
 14 It was more than the 1.2 million; is that
 15 correct?
 16 A Yes.
 17 Q Okay. You expected excess cash flow to
 18 repay the 1.2 million dollar note; is that what you
 19 said earlier?
 20 A Yes.
 21 Q Is that documented in any document signed by

Page 203

1 generated, not something Ortenzio gave him?
 2 MR. SWICHAR: Yes, exactly right.
 3 Q (By Mr. Swichar) Is there any document
 4 signed and made binding on Mr. Ortenzio or CCI that
 5 limited the repayment of the 1.2 million dollar note
 6 from excess cash flow?
 7 A No.
 8 Q Now, your attorney asked you a number of
 9 questions regarding a material adverse situation;
 10 would you have done this, if you had done that, if you
 11 had known that --
 12 MR. GEBHARDT: Adverse change.
 13 Q -- material adverse change.
 14 MR. SWICHAR: Off the record.
 15 (Discussion off the record.)
 16 Q (By Mr. Swichar) You were asked a lot of
 17 hypothetical questions about what you would have done
 18 had you known this, this, or that involving a material
 19 adverse change.
 20 The fact is that the bank, no one even
 21 bothered to consult with you as the loan officer who

Page 202

1 Mr. Ortenzio or CCI?
 2 A That was -- no, that was based on the, the
 3 cash flow pro formas that were given to the bank.
 4 Q Did you hear my question?
 5 My question was is there --
 6 MR. GEBHARDT: Well, he answered your
 7 question.
 8 Q My question is, is there any document signed
 9 by CCI or Mr. Ortenzio in which it was stated that the
 10 1.2 million dollar note would be paid from excess cash
 11 flow?
 12 MR. GEBHARDT: He answered the
 13 question.
 14 The cash flow statements they gave
 15 him -- he gave him.
 16 MR. SWICHAR: I'm saying any document
 17 signed --
 18 MR. GEBHARDT: Are you saying a loan
 19 document?
 20 MR. SWICHAR: Yes, any loan document.
 21 MR. GEBHARDT: A loan document the bank

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1 had the relationship with CCI; is that correct?
 2 A At what date --
 3 MR. GEBHARDT: Objection.
 4 A What date is this?
 5 Q Prior to the declaration of the default, you
 6 were never consulted as to whether or not a default
 7 should be declared on the basis of material adverse
 8 change or any other basis?
 9 MR. GEBHARDT: My questions didn't
 10 direct to that.
 11 It was February 11.
 12 MR. SWICHAR: Well, your question
 13 was -- your question was purely hypothetical. I'm
 14 bringing it back to the world of reality.
 15 MR. GEBHARDT: No, my question was if
 16 he had known the facts that were reflected on the
 17 financial statements that CCI had on February 11 --
 18 MR. SWICHAR: Okay.
 19 MR. GEBHARDT: -- at the time the
 20 payment was made, what would he -- and this was before
 21 Mr. Elias or anyone was brought in -- would he have

51 (Pages 201 to 204)

Craig J. Schwartz

Page 205

1 regarded in terms of the default situation.
 2 Q (By Mr. Swichar) You were not aware of any
 3 of the actual facts prior to the declaration of
 4 default on the basis of material adverse change; is
 5 that correct?
 6 A No, that is not correct.
 7 I knew there was on the meeting of the 18th
 8 the following week that the company had lost six
 9 million dollars. Up to that point, I was under the
 10 impression that the loss was going to be between a
 11 million two and two million for the year.
 12 Q Okay. No one came to you and asked you for
 13 your input as to whether or not a default should be
 14 declared?
 15 MR. GEBHARDT: Objection.
 16 When?
 17 MR. SWICHAR: Prior to the declaration.
 18 Between the 18th of February --
 19 MR. GEBHARDT: He's already testified
 20 no.
 21 MR. SWICHAR: Well, thank you.

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1 Q (By Mr. Swichar) Is that correct?
 2 A Yes.
 3 Q Okay.
 4 MR. GEBHARDT: Ask him again.
 5 MR. SWICHAR: That was the answer.
 6 Q (By Mr. Swichar) You testified that
 7 Mr. Ortenzio had the personal ability to repay the
 8 1.2 million dollar note from his own funds in contrast
 9 to the method by which it was actually paid.
 10 What is your basis on that?
 11 A The personal financial statement submitted
 12 to the bank.
 13 Q What was the date of that financial
 14 statement?
 15 A I don't recall.
 16 Q Was there any requirement in any loan
 17 document signed by CCI or Mr. Ortenzio that required
 18 him to repay the 1.2 million dollar CCI note from his
 19 personal funds?
 20 MR. GEBHARDT: How about the
 21 suretyship?

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1 I mean, you got it right there for
 2 God's sake.
 3 Q In contrast to CCI.
 4 A No.
 5 MR. SWICHAR: Let's go outside.
 6 (Mr. Swichar and Mr. Ortenzio left the
 7 conference room and then returned.)
 8 MR. SWICHAR: Okay, have a good trip
 9 back.
 10 MR. GEBHARDT: I have a couple, couple
 11 follow-ups.
 12 EXAMINATION BY COUNSEL FOR THE PLAINTIFF
 13 BY MR. GEBHARDT:
 14 Q Mr. Schwartz, at the time the 1.2 million
 15 dollar loan was being discussed in November of 1999,
 16 if you had known that Mr. Ortenzio was going to repay
 17 that loan in the manner in which it was repaid, would
 18 you have recommended approval of that loan?
 19 A No.
 20 Q Okay. In your dealings with Mr. Ortenzio on
 21 behalf of the bank, did you expect him to deal

Page 208

1 honestly and in good faith with the bank?
 2 A Yes.
 3 Q Do you regard his repaying the 1.2 million
 4 dollar loan with a draw on the four million dollar
 5 line of credit as an honest and good faith act on his
 6 part?
 7 MR. SWICHAR: Objection as to form.
 8 MR. GEBHARDT: Let me rephrase it.
 9 MR. SWICHAR: In contrast to taking
 10 advantage of the bank's own negligence?
 11 Q (By Mr. Gebhardt) How did you regard
 12 Mr. Ortenzio's act of repaying the 1.2 million dollar
 13 line -- loan -- with a draw on the four million dollar
 14 line in February of 1999?
 15 MR. SWICHAR: Can I hear it back,
 16 please?
 17 Q You may answer.
 18 MR. SWICHAR: I'd like to hear it back,
 19 please.
 20 MR. GEBHARDT: Well, he can answer, and
 21 then you can hear both the question and answer.

52 (Pages 205 to 208)

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1 MR. SWICHAR: Well, I'd like to hear it
 2 back.
 3 Q (By Mr. Gebhardt) Go ahead.
 4 MR. SWICHAR: Objection.
 5 I'd like to hear it back.
 6 MR. GEBHARDT: I'm entitled to have the
 7 witness answer the question.
 8 MR. SWICHAR: No, I'm entitled to have
 9 the Court Reporter rephrase -- give me back the
 10 question before it's answered.
 11 Now, I don't want to argue about it.
 12 I'd like to hear the question back.
 13 MR. GEBHARDT: Listen to it so you can
 14 give an answer after he's heard it.
 15 MR. SWICHAR: Fair enough.
 16 (Question was read by the Reporter.)
 17 MR. SWICHAR: Objection as to form.
 18 Q (By Mr. Gebhardt) In terms of --
 19 MR. SWICHAR: As -- as a judge? As a
 20 policeman? As a fireman? Or what?
 21 MR. GEBHARDT: Well, let me clarify

Page 210

1 that.
 2 Q (By Mr. Gebhardt) In terms of your
 3 expectations that Mr. Ortenzio would act with honesty
 4 and good faith, how did you regard the repayment of
 5 the line -- the repayment of the 1.2 million dollar
 6 loan with a draw on the four million dollar line in
 7 February of 1999?
 8 MR. SWICHAR: Objection as to form.
 9 His expectations are irrelevant.
 10 Expectations are based on the note.
 11 Q You may answer.
 12 A In light of what subsequently followed, a
 13 little bold.
 14 Q Okay.
 15 MR. SWICHAR: That's a legal -- nice
 16 legal term.
 17 MR. GEBHARDT: No further questions.
 18 MR. SWICHAR: One question.
 19 EXAMINATION BY COUNSEL FOR THE DEFENDANT
 20 BY MR. SWICHAR:
 21 Q You stated, Mr. Schwartz, that if you had

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1 known that Mr. Ortenzio -- that CCI would have repaid
 2 the 1.2 million dollar note out of the four million
 3 dollar line of credit, you would not have recommended
 4 approval of the note; is that correct?
 5 Isn't that what you just said?
 6 A Yes, yes.
 7 Q Now, if you had known, looking back in
 8 hindsight, that Mr. Ortenzio or Mr. -- or CCI would
 9 have repaid the 1.2 million from the four million
 10 dollar line of credit, would you have made an express
 11 prohibition in the 1.2 million dollar note expressly
 12 prohibiting CCI from repaying the 1.2 from the four
 13 million dollar line of credit?
 14 Would you have included an express
 15 prohibition of that conduct?
 16 MR. GEBHARDT: Objection.
 17 A It's possible.
 18 Q Would that have been the prudent thing to do
 19 in hindsight to go back and say let's prevent this
 20 from occurring by specifically prohibiting a repayment
 21 of the 1.2 from the four million dollar line of

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1 credit, as a prudent banker?
 2 A Yes.
 3 MR. SWICHAR: No further questions.
 4 MR. GEBHARDT: We're done.
 5 (Thereupon, at 2:56 p.m., the
 6 examination of the witness was concluded.)
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53 (Pages 209 to 212)

Craig J. Schwartz

Page 213

ACKNOWLEDGMENT OF DEPONENT

1 I, Craig J. Schwartz, do hereby acknowledge
 2 I have read and examined the foregoing pages of
 3 testimony, and the same is a true, correct and
 4 complete transcription of the testimony given by me,
 5 and any changes and/or corrections, if any, appear in
 6 the attached errata sheet signed by me.

7 _____
 8 Date Craig J. Schwartz

Page 215

1 February 20, 2002
 2 Mr. Lawrence J. Gebhardt
 3 Gebhardt & Smith, L.L.P.
 4 The World Trade Center
 5 401 East Pratt Street
 6 Ninth Floor
 7 Baltimore, MD 21202

8 Re: Allfirst Bank v. John M. Ortenzio
 9 Deposition of Craig J. Schwartz

10 Enclosed for review is your copy of the
 11 above-referenced deposition, which includes an
 12 Acknowledgment of Deponent. Please have the deponent
 13 read the copy of the transcript and sign the enclosed
 14 Acknowledgment of Deponent. Also enclosed is an
 15 errata sheet which the deponent should use to note
 16 corrections. The errata sheet(s) should be signed and
 17 dated by the deponent.

18 Maryland Rules stipulate that the deponent has thirty
 19 days in which to read and sign the transcript. After
 20 the deponent has reviewed the copy of the transcript,
 21 please return the Acknowledgment of Deponent and any
 errata sheets to our office at 401 E. Pratt Street,
 Suite 425, Baltimore, MD 21202. If you have any
 questions regarding this matter, please contact us.

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CERTIFICATE OF NOTARY PUBLIC

1 I, Kathleen R. Turk, the officer before
 2 whom the foregoing deposition was taken, do hereby
 3 certify that the witness whose testimony appears in
 4 the foregoing deposition was duly sworn by me; that
 5 the testimony of said witness was taken by me in
 6 stenotype and thereafter reduced to typewriting under
 7 my direction; that said deposition is a true record of
 8 the testimony given by said witness; that I am neither
 9 counsel for, related to, nor employed by any of the
 10 parties to the action in which this deposition was
 11 taken; and, further, that I am not a relative or
 12 employee of any attorney or counsel employed by the
 13 parties hereto, nor financially or otherwise
 14 interested in the outcome of the action.

15 _____
 16 Kathleen R. Turk
 17 Notary Public in and for the
 18 State of Maryland.

19 My Commission Expires:
 20 March 1, 2003.

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1 ESQUIRE DEPOSITION SERVICES
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ERRATA SHEET

6 Case Name: Allfirst Bank v. John M. Ortenzio
 7 Witness Name: Craig J. Schwartz
 8 Deposition Date: February 15, 2002
 9 Job No.: 143249

10 Reason For
 11 Page No. Line No. Correction Correction

12 _____
 13 Signature Date

54 (Pages 213 to 216)

Esquire Deposition Services

1-800-441-3376

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

3 ALLFIRST BANK. :
4 PLAINTIFF :
5 VS : NO: 1:01-CV-786
6 JOHN M. ORTENZIO, :
7 DEFENDANT :

8 DEPOSITION OF: SHERI PHILLIPS
9 TAKEN BY: PLAINTIFF
10 BEFORE: HILLARY M. HAZLETT, REPORTER
11 NOTARY PUBLIC
12 DATE: MARCH 13, 2002, 10:43 A.M.
13 PLACE: ALLFIRST BANK BUILDING
14 213 MARKET STREET
15 14TH FLOOR
16 HARRISBURG, PENNSYLVANIA

17 APPEARANCES:
18 GEBHARDT & SMITH
19 BY: LAWRENCE J. GEBHARDT, ESQUIRE
20 FOR - PLAINTIFF
21 BLANK, ROME, COMISKY & MCCAULEY, LLP
22 BY: EDWARD I. SWICHAR, ESQUIRE
23 FOR - DEFENDANT
24 HARTMAN, OSBORNE & JOYCE, P.C.
25 BY: MELINDA S. JOYCE, ESQUIRE
26 FOR - SHERI PHILLIPS

27 ALSO PRESENT:
28 JAMIN M. GIBSON
29 JOHN M. ORTENZIO

1 INDEX
2 WITNESS
3 FOR PLAINTIFF DIRECT CROSS REDIRECT RECROSS
4 Sheri Phillips 3 60 101 111

5 EXHIBITS
6 DEPOSITION EXHIBIT NO. MARKED
7 1 - 3/23/1999 Letter 12
8 2 - Film/cash Solutions 13
9 3 - Audit Report 21
10 4 - 10/26/1999 Inter-office Memorandum 24
11 5 - 11/4/1999 Inter-office Memorandum 25
12 6 - 11/5/1999 Letter 31
13 7 - Commercial Loan Note 32
14 8 - Income Statement 40
15 9 - Balance Sheet 40
16 10 - Cash Flow Projections 49

1 STIPULATION
2 It is hereby stipulated by and between
3 counsel for the respective parties that reading,
4 signing, sealing, and certification are waived; and
5 that all objections except as to the form of the
6 question are reserved to the time of the trial.
7
8 SHERI PHILLIPS, called as a witness, being
9 duly sworn, testified as follows:
10
11 DIRECT EXAMINATION
12
13 BY MR. GEBHARDT:
14 Q Would you let us know first your residence
15 and then your business addresses?
16 A Residence is 2837 North Front Street, Suite
17 302, Harrisburg, PA 17110.
18 Q And your business address?
19 A 515 North Office Building, Harrisburg, PA
20 17125.
21 Q And where are you presently employed?
22 A Commonwealth of Pennsylvania.
23 Q And what do you do for the Commonwealth of
24 Pennsylvania?
25 A I'm the Deputy Secretary of Administration

1 and General Services.
2 Q How long have you had that position?
3 A Since July.
4 Q Prior to that time, where did you work?
5 A I did consulting for one company, and I
6 also worked with another company that was part-time
7 that I had helped start.
8 Q And at some point in time, you worked for a
9 company known as CCI Construction?
10 A That's correct.
11 Q And when did you leave CCI?
12 A It was -- I think my last day was around
13 May 5th, 2000.
14 Q And when did you begin working for CCI?
15 A In September of 1991.
16 Q Would you relate for me just briefly what
17 your positions with CCI were from September 1991
18 through the date you left in terms of a job
19 description and just a brief outline of what your
20 duties were?
21 A When I started, I worked for Dave Barber
22 and I was the controller. I think that was my title.
23 My titles changed kind of in between there. I was
24 responsible for the accounting, and I reported to
25 Dave. I think his title was chief financier at the

5

1 time.

2 I think Dave left around 1995. At that
3 point, I assumed his duties; and I was -- again, the
4 titles changed -- the chief financial officer. I was
5 responsible for managing the accounting department.

6 I was also responsible for obtaining the
7 financing for the company. Over time, I've
8 accumulated some other things, handling our IMS,
9 which is information management systems. It was kind
10 of a multitude of things.

11 Q In terms of overseeing the accounting
12 department for a time period -- let's focus kind of
13 on the 1999/2000 period. What kinds of things would
14 you do in terms of managing the accounting
15 department?

16 A In that time period, I -- actually, we had
17 someone leave. There was an accounting manager --
18 again, we changed titles in there -- slash,
19 controller. I forget her exact title. She was
20 responsible for the actual day-to-day management but
21 she had left -- I think that was around the fall of
22 '99. She was not replaced, so then I was responsible
23 for the day-to-day operations of overseeing everyone
24 in the accounting department.

25 Q How many people were there in the

6

1 accounting department in that 1999/2000 time frame,
2 roughly?

3 A I would say probably five to seven.

4 Q As part of the -- and again, staying within
5 the same period unless I tell you otherwise, let's
6 continue to focus on that period of 1999 to 2000.
7 What kinds of regular financial reports internally
8 did the CCI Construction Company generate?

9 A We would do an income statement, a balance
10 sheet, a trial balance, work in progress report, cash
11 flow reports, accounts receivable, accounts payable,
12 and then your normal things related to payroll and
13 your cash disbursements and cash receipts.

14 Q And then I would be correct that there was
15 an income statement, and as you've indicated, a
16 balance sheet and a cash flow. Were they generated
17 monthly?

18 A Yes.

19 Q And were they then -- were they first
20 presented to you for review from whoever in the
21 department was working on them?

22 A Yes, that's correct.

23 Q What would you do with them after you
24 received what your staff had generated?

25 A After I reviewed them, made any final

7

1 adjustments that might be needed to be made, once
2 they were all final, I had a -- I had to give copies
3 to our bonding company and our bank; and one of them
4 was quarterly, one of them was monthly.

5 And I'd give copies to the president of the
6 company and the chief operating officer of the
7 company. At that point, I think maybe the senior VP
8 also got copies of them.

9 Q And the president was Mr. John Ortenzio?

10 A Yes.

11 Q And the chief operating officer was who?

12 A Shane Miller.

13 Q In the 1999/2000 time frame, was there any
14 instance when you did not convey monthly financial
15 statements -- internally-generated financial
16 statements to Mr. Ortenzio?

17 A Not that I recall.

18 Q Was it your practice at all to discuss the
19 substance and content of those financial statements
20 with Mr. Ortenzio after you had given him copies?

21 A Yes, it was.

22 Q Based on your observations of Mr. Ortenzio,
23 did he familiarize himself with the financial results
24 reflected in the internally-generated financial
25 statements?

8

1 A I would say yes. I mean, we discussed
2 them.

3 Q Based on your discussions with him, he
4 appeared to understand what the financial results
5 were that were reflected on the statements?

6 A Yes.

7 Q Now, you've also indicated that you were
8 responsible for obtaining financing for the company?

9 A That's correct.

10 Q And during the period of time you were
11 there, the company's primary bank was initially
12 Dauphin Deposit, what ultimately became today
13 Allfirst Bank?

14 A That's correct.

15 Q What kinds of things did you do in terms of
16 obtaining financing for the company?

17 MS. JOYCE: Again, in the 1999/2000 time
18 frame or overall?

19 BY MR. GEBHARDT:

20 Q Well, did there come a period of time when
21 that function, obtaining financing for the company,
22 became one of your job aspects?

23 A When I first started, Dave Barber handled
24 that.

25 Q All right.

9

1 A I don't recall in prior years back in '91
2 if I was in the meeting or not. I think I might have
3 been, but Dave handled it at that point. After Dave
4 left, it became my responsibility.

5 Q What sort of things would you do in terms
6 of obtaining financing from banks?

7 A I would get quotes from more than one bank.
8 I don't know if I did that every year, but I talked
9 to other banks and got comparisons. I'd look at
10 interest rates and look at what is going on in the
11 market and talk to our bank and tell them where we
12 stood and negotiated a loan.

13 Q Would I be correct, during your period of
14 time at CCI, there was a revolving line of credit in
15 place with a bank?

16 A That's correct.

17 Q And that was initially Dauphin Deposit
18 which then became Allfirst Bank?

19 A As I recall, I think it was Dauphin right
20 from the beginning. There may have been another bank
21 that had loans years ago. I don't recall exactly,
22 but Dauphin and Allfirst was our bank.

23 Q And this was an unsecured line of credit?

24 A In the 1999/2000 year, that's correct.
25 That's correct. It may not have been the whole time

10

1 period.

2 Q And over the period of time that you were
3 with CCI, the line of credit increased, if my memory
4 is correct, somewhere around 600,000 to a million
5 dollars, ultimately up to \$4 million in 1999?

6 A It did increase to the 4 million. I don't
7 recall what the exact amount was. It did increase.

8 Q In terms of negotiating the line of credit,
9 was Mr. Ortenzio -- let me back that up.

10 In terms of negotiating the line of credit
11 once you took over the function of arranging the bank
12 financing, did Mr. Ortenzio involve himself?

13 MS. JOYCE: Let me interject. Are you
14 talking about a specific time frame?

15 BY MR. GEBHARDT:

16 Q Well, let's start in general. Once you
17 took over the function after the old CFO left --

18 MR. SWICHAR: Larry, 1995?

19 MR. GEBHARDT: Right.

20 THE WITNESS: In 1995 -- the question was,
21 Did he --

22 BY MR. GEBHARDT:

23 Q Let me rephrase it. Starting with the 1995
24 period and going forward, how much involvement did
25 Mr. Ortenzio have in your function in terms of

11

1 arranging the financing for the company?

2 A He did not have a very big involvement
3 initially. He got very involved when we started
4 having more financial problems at the end; but up
5 until the \$4 million line of credit, I negotiated
6 with the bank.

7 Q And so you would have been the person that
8 negotiated and got into place the \$4 million line of
9 credit?

10 A That's correct.

11 Q And would I be correct in saying that
12 Mr. Ortenzio was not very involved in obtaining the
13 \$4 million line of credit?

14 MS. JOYCE: I object to the form of
15 question, not very involved.

16 BY MR. GEBHARDT:

17 Q His involvement -- his more limited
18 involvement, as you've described it in your previous
19 answer, was pertaining to the \$4 million line of
20 credit also?

21 MR. SWICHAR: I object. Why don't you ask
22 her what was John's --

23 MR. GEBHARDT: All right.

24 BY MR. GEBHARDT:

25 Q What was John Ortenzio's involvement in

12

1 obtaining the \$4 million line of credit?

2 A He did not actually meet with the bank. I
3 met with the bank. He was aware what was going on
4 and talked to me about what I was doing, what my
5 plans were, what the amount of the loan was. So I
6 had spoken to him about that outside of the meeting
7 with the bank. But when I actually sat down with the
8 bank, he was not in those meetings as I recall.

9 Q What was the purpose to your understanding
10 as the CFO of the \$4 million line of credit?

11 A To cover the work in progress and cover our
12 cash flow needs as the receivables were coming in.

13 MR. GEBHARDT: Will you mark this as the
14 first deposition exhibit?

15 (3/23/1999 letter was marked as Deposition
16 Exhibit No. 1.)

17 BY MR. GEBHARDT:

18 Q I've handed you what has been marked as
19 Deposition Exhibit 1, which purports to be a letter
20 dated March 23rd, 1999, to you from Craig Schwartz on
21 the letterhead of the First National Bank of
22 Maryland, which is the predecessor name for Allfirst
23 Bank. Do you recognize your -- is that your
24 signature on the last page?

25 A Yes, it is.

13

1 Q And this would be a commitment letter for
2 the \$4 million line of credit we have been
3 discussing?
4 A Without reading it word for word, yes.
5 This looks like it.
6 Q And on the first page where there's a
7 statement, Use of Proceeds, is that use of proceeds
8 consistent with your understanding of the purpose of
9 the loan?
10 A Yes, it is.
11 Q Okay. Now, did you also -- if you look
12 down to the last paragraph, you'll see that there's a
13 date of April 30, 2000. What significance did you
14 understand that the April 30, 2000 date to have in
15 terms of the line of credit?
16 A As of April 30th of 2000, it expired; and
17 every year, we would have to renew it to go forward.
18 MR. GEBHARDT: Call this SP-1?
19 MR. GEBHARDT: Just Deposition Exhibit 1.
20 MR. SWICHAR: Call it SP-1.
21 MR. GEBHARDT: Let's do this one as 2.
22 (Film/cash solutions promissory note was
23 marked as Deposition Exhibit No. 2.)
24 BY MR. GEBHARDT:
25 Q I've handed you what has been marked as

14

1 Deposition Exhibit No. 2. I would ask you if you
2 understand that exhibit to be a copy of the
3 promissory note evidencing the \$4 million line of
4 credit?
5 A Yes, this looks like the document.
6 Q And that is your signature on behalf of the
7 borrower on the signature page?
8 A Yes, it is.
9 Q Now, there are some initials and
10 line-throughs and so on, on the second and third
11 page. Would I be correct that those are your
12 initials and that you are the person who drew the
13 lines through?
14 A That's correct.
15 Q Could you tell me mechanically or in the
16 context of when and how you placed those marks on the
17 note?
18 A Whenever I received any document that we
19 had to sign on behalf of the company, I always
20 reviewed them in detail and looked to see if there
21 was anything in there that may not be to the
22 advantage of the company and that is part of what I
23 would look at in part of negotiating the loans.
24 Those are the things that I obviously
25 didn't like in the agreement and later talked to

15

1 Craig Schwartz about.
2 Q Did you talk to him about them before you
3 crossed them out and initialed them or after?
4 A Before.
5 Q And what was the result of your discussion
6 with Mr. Schwartz on those points?
7 A As I recall, he needed to -- he didn't
8 think it would be a problem; but he needed to verify
9 it first, and then he got back to me and said that
10 was fine and go ahead and make the notations and
11 initial them.
12 Q Did you discuss with Mr. Ortenzio any of
13 the phrases that you X'd out and initialed?
14 MS. JOYCE: Just those or the document in
15 general?
16 BY MR. GEBHARDT:
17 Q Well, let's focus specifically on the ones
18 you X'd out and initialed. Did you discuss any of
19 those with Mr. Ortenzio?
20 A Yes, I did.
21 Q Did you discuss all of them or just one or
22 two?
23 A As I recall, I discussed all of them
24 because there was one comment that I remember he
25 wanted me to put in there.

16

1 Q And these were points that you raised with
2 him or he raised with you first?
3 A I raised them with him.
4 Q Now, was there a cash management feature
5 with the --
6 A Just back up a minute. I raised them with
7 him, but the one point he raised was with me.
8 Q What point was that?
9 A That within the 30 days there would be
10 notice as far as the repayment.
11 Q Was there a cash management feature that
12 accompanied or was attached or related to the --
13 MR. SWICHAR: Are you referring to
14 paragraph 6?
15 THE WITNESS: Yes.
16 MR. SWICHAR: Thanks.
17 BY MR. GEBHARDT:
18 Q Was there a cash management feature
19 associated with the line of credit?
20 A Yes, there was.
21 Q And what was your understanding of how that
22 cash management feature worked?
23 A We had the line of credit; and as checks
24 were drawn on our checking account, the money would
25 come from our line of credit to cover that. If there

17

1 was excess money, it would be invested and we would
2 get the income from it.

3 Q Hypothetically, if -- let me rephrase this.
4 How would customer payments in this 1999
5 period be made to CCI in relation to the cash
6 management feature?

7 MR. SWICHAR: May I hear the question back?

8 MS. JOYCE: And you're not talking
9 hypothetically as you started the last question,
10 correct?

11 MR. GEBHARDT: No. This is actually how
12 did customers pay CCI in the 1999 time frame.

13 MR. SWICHAR: I don't need it back.

14 THE WITNESS: It could have been one of two
15 ways: One, I would write a check; and we would
16 deposit it in the bank account; or two, as many as
17 possible had set up on a direct payment through a
18 wire transfer from their account into ours.

19 We did a lot of government work, and
20 sometimes it took forever to get it set up. Most of
21 them, pretty many of them I had set up on wire
22 transfers that would automatically go into our
23 account.

24 BY MR. GEBHARDT:

25 Q You set up as many as you could in that

18

1 fashion?

2 A Yes.

3 Q And that carried through also the 2000
4 period as of the time you left?

5 A That's correct.

6 Q The wire transfer feature having the CCI
7 customer wire their payments directly to Allfirst is
8 something that benefited CCI?

9 A Most definitely.

10 Q If there had been an excess of deposits
11 over any outstanding balance on the line of credit
12 that would have given CCI a positive balance --

13 MR. SWICHAR: Objection to the form of the
14 question. I would first establish if there were ever
15 an excess.

16 MR. GEBHARDT: Well, let's trace --

17 MR. SWICHAR: Take it out of the world of
18 hypothetical.

19 BY MR. GEBHARDT:

20 Q In terms of how the cash management feature
21 worked, if there were less deposits on a given day
22 than there were checks that CCI had written to pay
23 bills, what would happen?

24 A If there were less deposits, we would draw
25 on the line of credit to pay the checks that were in

19

1 excess.

2 Q And if there were more deposits than there
3 were checks written to pay bills, what would happen?

4 A They would sweep the account and invest the
5 money.

6 Q Would I be correct if there was an existing
7 outstanding balance on the line of credit, that
8 excess would pay down the line of credit?

9 MS. JOYCE: Object to the form of the
10 question. You may answer.

11 BY MR. GEBHARDT:

12 Q In other words, if there was an outstanding
13 balance on the line of credit of \$500,000 and CCI
14 wrote \$100,000 of checks that were presented on a
15 specific day but \$150,000 of payments came in from
16 customers, there would be an excess of \$50,000,
17 right, in the hypothetical?

18 What would happen under the cash management
19 feature to your understanding with that \$50,000?

20 A If there's excess deposits coming in, they
21 would pay down the line of credit.

22 Q And if there was no balance on the line of
23 credit at the time those excess deposits came in,
24 then they would create a positive balance on CCI's
25 bank account?

20

1 A Yes.

2 Q And CCI would gain interest on that?

3 A Yes. They would be swept and put into
4 purchasing.

5 Q As of the start or the first quarter of
6 calendar year 1999, CCI had -- let me actually
7 rephrase it.

8 As of the conclusion of calendar year 1999
9 -- in other words, December 31, 1999 -- CCI, in fact,
10 had four credit facilities or loans outstanding with
11 Allfirst, right?

12 MS. JOYCE: Object to the form of the
13 question. You can answer.

14 BY MR. GEBHARDT:

15 Q We have the 4 million --

16 A As I recall, there was a \$4 million line of
17 credit. There was a \$1.2 million line. There were
18 equipment loans. I don't remember how many we
19 aggregated together. I'm not sure how many equipment
20 loans there were, so I can't answer exact number.

21 Q Do you remember there being a \$2 million
22 equipment loan or line of credit financing of
23 equipment?

24 A Yes, I do.

25 Q Now --

21

1 MR. SWICHAR: Just a minute. You said
2 four, and she said three. She provided three.

3 MR. GEBHARDT: She's correct. I'm
4 incorrect.

5 MR. SWICHAR: I was waiting for her to
6 correct you.

7 BY MR. GEBHARDT:

8 Q Let's make the record clear. There were
9 actually the three credit facilities available as of
10 December 31, 1999; namely, the \$4 million line of
11 credit, the \$1,200,000 loan, and a \$2 million
12 equipment loan or line of credit?

13 A And as I'm saying, as I recall, yes, I
14 remember all those loans. I don't remember if we had
15 any other small pieces of equipment financed
16 separately; but yes, I remember all of those three.
17 Those are the three main ones that I remember.

18 MR. GEBHARDT: Let's do this as the next
19 exhibit.

20 (Audit report and financial statements for
21 years ended December 31, 1998 and 1997 was marked as
22 Deposition Exhibit No. 3.)

23 BY MR. GEBHARDT:

24 Q Okay. I've handed you what has been marked
25 as Deposition Exhibit No. 3 which purports to be the

22

1 audit report and financial statements of CCI
2 Construction for the years ended December 31, 1998
3 and 1997. Does that appear to be what this document
4 is to you?

5 A Yes, it does.

6 Q Would I be correct, looking at the
7 financial report that's been presented, that CCI did
8 not lose money for the fiscal year 1998?

9 A That's correct.

10 Q And if you look at it, it's page 12 of the
11 audited report, BATE stamp number at the bottom,
12 C 7637, there's a Paragraph No. 6, Operating line of
13 credit. The last sentence says, quote, The company
14 has no outstanding balance on the line of credit at
15 December 31, 1998, period, end quote.

16 Testing your memory, does that roughly
17 accord with your recollection of the line of credit
18 as of that year?

19 A I can't really answer that as a yes/no only
20 because our line of credit was a constant revolving
21 line. I do know at year end, we would hold writing
22 checks if we could and get deposits in to try and
23 have your financial statement look as healthy
24 cashwise as possible. So that makes sense, but do I
25 actually remember it? No.

23

1 Q Over the course of time you were at CCI,
2 were there times when the company had no borrowings
3 under its line of credit?

4 A Yes, sir.

5 Q In fact, on some of the lines of credit,
6 there was actually a requirement that CCI be out of
7 the line of credit?

8 MR. SWICHAR: Can I hear that again?

9 (The reporter read back the referred-to
10 portion of the record.)

11 MR. SWICHAR: My objection was, Was there a
12 requirement? There's a document. That was my
13 objection.

14 BY MR. GEBHARDT:

15 Q Do you recollect whether there in the lines
16 of credit that were in existence over the period of
17 time you were there from 1991 through 2000 whether
18 there was customarily a feature that to those lines
19 of credit that required CCI to have no borrowings
20 for a 30 consecutive day period?

21 MR. SWICHAR: And I object to the form of
22 the question because I don't know what you mean.

23 MR. GEBHARDT: You may answer.

24 MS. JOYCE: If you understand what he
25 means, if you need clarification, you may request it.

24

1 THE WITNESS: During the course of the
2 loans that we had with Allfirst, there were
3 definitely times where there was a provision in the
4 loan that said it had to be paid down for 30 days at
5 certain points in time. Whether that was in the last
6 loan, I don't recall.

7 BY MR. GEBHARDT:

8 Q Now, in fiscal year 1999, did CCI
9 experience some financial reverses?

10 A Financial reverses? I'm sorry.

11 Q Did CCI experience some financial
12 difficulties in 1999?

13 A Our profits started decreasing in -- yes,
14 on our jobs. Yes, they did.

15 MR. GEBHARDT: Let's mark this as the next
16 exhibit.

17 (10/26/1999 inter-office memorandum was
18 marked as Deposition Exhibit No. 4.)

19 BY MR. GEBHARDT:

20 Q I've handed you Deposition Exhibit 4, which
21 is a memorandum prepared by Craig Schwartz to
22 evidence a meeting that he states he had with you and
23 with John Ortenzio on or about October 26th, 1999.

24 Do you recollect having a meeting with
25 Mr. Schwartz at the end of October of 1999?

25

1 A Yes, I do.
 2 Q And do you remember -- what was the purpose
 3 of that meeting to your recollection apart from what
 4 Mr. Schwartz makes --
 5 MR. SWICHAR: Just to clarify, I think you
 6 have the same -- do you have three copies of the
 7 identical document?
 8 MR. GEBHARDT: It looks that way. Let's
 9 just tear the top one off.
 10 BY MR. GEBHARDT:
 11 Q What do you recollect had happened in that
 12 meeting?
 13 A We had talked to, as I recall it, Mike
 14 Zarcone and John Schwartz and John and I in the
 15 meeting. As I recall, this was one of the first
 16 meetings that John was involved in with Allfirst. We
 17 had talked to them about getting an additional amount
 18 added to our line of credit because of some financial
 19 cash shortages we were having.
 20 MR. GEBHARDT: Let's mark this as the next
 21 exhibit.
 22 (11/4/1999 inter-office memorandum was
 23 marked as Deposition Exhibit No. 5.)
 24 BY MR. GEBHARDT:
 25 Q I've handed you Exhibit 5, which is another

26

1 memorandum prepared by Craig Schwartz which appears
 2 to reflect, what, a meeting that was held on November
 3 4, 1999, in which Michael Zarcone met with you and
 4 Mr. Ortenzio?
 5 Is it possible there were two meetings, one
 6 that Mr. Zarcone attended and one that he had not
 7 attended?
 8 A That is possible. I recall everything
 9 being talked about in the same meeting, but it is
 10 possible it was two separate meetings.
 11 Q Is it fair to say, as reflected in
 12 Mr. Schwartz's memorandum which is Exhibit No. 4,
 13 that for the 9-month period CCI had lost \$1.5
 14 million?
 15 MS. JOYCE: Object to the form of the
 16 question. You may answer.
 17 THE WITNESS: The 1.5 million -- I do
 18 remember in the meeting discussing our loss at that
 19 time, and the 1.5 was correct. I made sure that I
 20 had explained more than once in the meeting that
 21 Scott Air Force Base -- and it's noted in here a
 22 claim has been filed in the amount of \$4 million.
 23 The 1.5 million was assuming we would get
 24 the \$4 million on the Scott Air Force Base claim. So
 25 if we did not get the 4 million, our loan would not

27

1 be our loss. It would have been more like 5 and a
 2 half million.
 3 So yes, the one and a half, I remember that
 4 discussion; but I did explain that it could be
 5 larger. It was based on us receiving that claim or
 6 change.
 7 BY MR. GEBHARDT:
 8 Q And the Albemarle Prison job was another
 9 problem job for CCI at this time?
 10 MS. JOYCE: Objection to the form of the
 11 question. You may answer if you understand what he
 12 means by problem just so you're both on the same
 13 page.
 14 THE WITNESS: As it's saying not as
 15 profitable, we were experiencing declining job
 16 profits until loss of Albemarle.
 17 BY MR. GEBHARDT:
 18 Q What was the -- these meetings, the one or
 19 the two that we're discussing, were they called by
 20 the representatives of Allfirst or by representatives
 21 of CCI?
 22 A We called a meeting to get an additional
 23 loan. Now, if there were two, like I said, I'm
 24 remembering all the discussions as one specific
 25 meeting. But if there were actually two, they may

28

1 have called the first one. I know we called a
 2 meeting to talk to them about the additional loan.
 3 Q What was the reason for asking for an
 4 additional loan or an additional line?
 5 A We were having serious cash flow problems
 6 because we had incurred a lot of expenses on Scott
 7 Air Force Base that we had not gotten paid for.
 8 There were other things related to other jobs, but
 9 the biggest part of it was Scott Air Force Base.
 10 Q And what was the specific, at least the
 11 initial request, to Allfirst? What was CCI asking
 12 Allfirst to do?
 13 A To give us an additional loan to cover our
 14 cash shortages. I don't recall -- I was assuming we
 15 had asked for 1.2.
 16 Q Was the request to increase the \$4 million
 17 line to 5 million or 5.2 million, or was there a
 18 request for a separate loan?
 19 MS. JOYCE: Object to the form of the
 20 question. You've given her two alternatives.
 21 MR. SWICHAR: I object too because there is
 22 a document that would be helpful if shown
 23 BY MR. GEBHARDT:
 24 Q Do you recollect what the original request
 25 was, not the loan that was made, but whether CCI

29

1 asked for the line of credit to be increased for a
2 separate loan or for some other credit that was not
3 ultimately given?

4 A I think we initially wanted an increase in
5 the line of credit.

6 Q And what was the response initially from
7 Allfirst to the request?

8 A As I recall -- I guess I'm not sure what
9 you're looking for.

10 Q In other words, you asked -- CCI asked
11 Allfirst to increase the line of credit from \$4
12 million to \$5 million. What was Allfirst's response?

13 MR. SWICHAR: Objection.

14 MS. JOYCE: I'm going to object. You
15 mischaracterized her testimony. She indicated that
16 the request was for an additional loan to cover cash
17 shortage. She did not indicate a specific amount.
18 So I'm going to instruct her not to answer that
19 because it mischaracterizes what she testified to.

20 BY MR. GEBHARDT:

21 Q You indicated, I believe, that CCI
22 initially asked for an increase in the \$4 million
23 line of credit?

24 A Yes, I do.

25 Q And I think you also indicated that the

30

1 amount of the increase that was being requested was
2 at least a million dollars; is that correct?

3 MS. JOYCE: Object to the form of the
4 question.

5 MR. SWICHAR: I object to the form of the
6 question.

7 BY MR. GEBHARDT:

8 Q Is that correct?

9 A That it was at least a million?

10 Q Yes.

11 A Yes.

12 Q And what was Allfirst's response to the
13 request by CCI to increase the \$4 million by a line
14 of credit by at least a million dollars?

15 A As far as I recall, they wanted to set it
16 up under a separate note because they were handling
17 it differently because the \$4 million was an
18 unsecured line of credit. They wanted any additional
19 amount to be personally guaranteed by the president.

20 Q And whose idea was the guarantee by the
21 president of CCI? Where did that idea originate?

22 MS. JOYCE: If you know.

23 BY MR. GEBHARDT:

24 Q Let me rephrase the question. Did Allfirst
25 indicate in the meetings that it was willing to give

31

1 an additional \$1 million of credit to CCI unsecured?

2 A No, I don't recall that in the meeting.

3 Q Okay. Was there any indication by Allfirst
4 of conditions -- of the conditions under which they
5 would grant additional credit of a million dollars or
6 more?

7 A As I recall, it was -- they said that they
8 would do it -- as I recall, there was some discussion
9 about what we could give as collateral for this
10 additional amount. Most of our equipment had already
11 been financed. What wasn't, they said they could
12 take a part of that; but in addition to that, they
13 wanted a personal guarantee on the loan.

14 Q And that was from Mr. Ortenzio?

15 A Yes.

16 MR. GEBHARDT: Could I have this marked the
17 next exhibit?

18 (11/5/1999 letter was marked Deposition
19 Exhibit No. 6.)

20 BY MR. GEBHARDT:

21 Q I've handed you what has been marked as
22 Deposition Exhibit No. 6 which is a copy of the
23 commitment letter for the \$1,200,000 loan that
24 Allfirst made to CCI Construction on or about
25 November 5, 1999.

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1 While your signature is not on this, it has
2 been identified in other depositions. I don't think
3 there is any dispute that this is a copy of the
4 commitment letter.

5 The first question is, Did you see a copy
6 of the commitment letter at or about the time it was
7 issued?

8 A I did. Actually, that is my signature.
9 I'm just attesting, but it does have my signature.

10 MR. GEBHARDT: All right. Very good.

11 Let's mark this has Deposition Exhibit No. 7.

12 (Commercial loan note was marked as
13 Deposition Exhibit No. 7.)

14 BY MR. GEBHARDT:

15 Q I've handed you Deposition Exhibit No. 7
16 which is a commercial line note dated November 8th,
17 1999. Is your signature also on the second page of
18 that attesting?

19 A As a witness, yes.

20 Q And Exhibit 7 would be the promissory note
21 reflecting the \$1.2 million loan that is described in
22 the commitment letter that's Exhibit 6?

23 A That's correct.

24 Q Now, if you look at Exhibit 6, the next to
25 the last paragraph, you'll see a statement that,

33

1 quote, if no demand is made, the loan will expire and
2 all borrowings will be due and payable, comma,
3 together with interest thereon, on March 31, 2000 --

4 MS. JOYCE: For the record, you're talking
5 about the second to the last paragraph on page 1 of
6 Exhibit No. 6?

7 MR. GEBHARDT: Yes.

8 BY MR. GEBHARDT:

9 Q -- period, unquote. Was it your
10 understanding that the \$1,200,000 loan was due from
11 CCI on or about March 31, 2000?

12 A Yes.

13 Q In the course of the meetings that you may
14 have had with Mr. Zarcone and Mr. Schwartz on behalf
15 of Allfirst, was there any discussion of where CCI
16 was going to get the money to repay the \$1,200,000
17 loan by March 31, 2000?

18 A As I recall, it was definitely discussed.
19 Whether it was at that meeting or in the paperwork
20 afterwards on the phone, I'm pretty sure it was at
21 that meeting. Yes, we had discussions about how that
22 money would be paid back.

23 Q And what was the substance of those
24 discussions?

25 A That the cash flow that we would have

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1 coming in from receivables and projects would
2 generate enough cash to pay this down on a short-term
3 basis.

4 Q In the discussions, was it discussed that
5 CCI would repay the \$1.2 million loan by making a
6 borrowing on the \$4 million line of credit?

7 A No, it was not.

8 Q I note on Exhibit 4 that again there's the
9 reference to the \$4 million Scott Air Force Base
10 receivable. Did that \$4 million receivable have any
11 relationship to a source of funds to repay the \$1.2
12 million loan?

13 A I don't recall if that -- if that was
14 specifically said or not.

15 Q Now, at the time the \$1.2 million loan was
16 being taken out, I take it you had discussions with
17 Mr. Ortenzio about the borrowing?

18 A That's correct.

19 Q And did you and Mr. Ortenzio discuss where
20 CCI would obtain the funds to repay the \$1.2 million
21 when it came due which, according to the commitment
22 letter, was March 31, 2000?

23 A Yes, we did.

24 Q And what was the substance of those
25 discussions?

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1 A I had done some cash flow projections. I
2 know John was adamant about having this paid back on
3 a short-term basis. When I gave him the cash flow
4 projections, I had said that if the job profits that
5 are projected hold, we would have the money to pay
6 back this 1.2 million.

7 I also told him that we had seen declining
8 job profit projections over time. I said, I'm not
9 making the projections on the jobs. That's what I've
10 been given from the people in operations. Each month
11 they were decreasing.

12 I said, based on what the most current
13 projections were, if they came in at that amount, we
14 would have the cash flow to pay back the 1.2 million.

15 Q At the time you were having these
16 discussions with Mr. Ortenzio, were there any
17 discussions about using a borrowing under the \$4
18 million line of credit to repay the \$1.2 million
19 guaranteed note?

20 A No, there were not.

21 Q In 1999 and the year 2000, did
22 Mr. Ortenzio, to your knowledge, have any involvement
23 in the repaying of the loans to Allfirst Bank?

24 A Which loans?

25 Q Well, there were three loans. You had the

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1 line of credit -- let's start first with the \$4
2 million line of credit. Did he get involved in how
3 that was being paid or repaid at all?

4 A I'm not sure.

5 MS. JOYCE: What time?

6 MR. GEBHARDT: In 1999 and 2000.

7 THE WITNESS: Did he get involved in how it
8 was repaid?

9 BY MR. GEBHARDT:

10 Q Or the process, the repayment process?

11 A No, that was the line of credit. As the
12 cash came in, it was paid down.

13 Q How about the repayment of the equipment
14 loan?

15 A No, he did not.

16 Q Okay. Now, the \$1.2 million loan was
17 repaid by CCI on or about February 11, 2000, by the
18 delivery of a check by Mr. Ortenzio personally to
19 Allfirst.

20 Prior to that date, had you had any
21 discussions with Mr. Ortenzio about the repayment of
22 the \$1.2 million line of credit?

23 A Yes. He had come to me about that.

24 Q And what was the substance of the
25 discussions you had?

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1 A He wanted to pay down the \$1.2 million --
2 the \$1.2 million line, he wanted to pay down because
3 he had that personally guaranteed. He had asked me
4 about writing a check out to pay that off from the
5 line of credit, and I refused.

6 Q Why did you refuse?

7 A I didn't think it was in the best interest
8 of the corporation to do that.

9 Q And could you explain why you had those --
10 that you didn't think it was in the best interest of
11 the corporation?

12 A One, I guess I didn't think there was any
13 benefit to doing it. The interest rates were the
14 same in the loans so there was no corporate benefit
15 from paying one -- drawing in one line of credit to
16 pay the other.

17 Two, if we had the extra cash, I would have
18 thought it best suited to pay payroll and accounts
19 payable and subcontractors.

20 Q And at the time the loan was paid in
21 February, the company was experiencing cash flow
22 difficulties?

23 A Yes.

24 Q And did you understand that repaying the
25 \$1.2 million loan with a draw on the \$4 million line

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1 of credit would reduce the amount of available cash
2 to the company?

3 A Yes, definitely.

4 Q Okay. Now, in terms of the physical paying
5 of the \$1.2 million loan, you did not write the
6 check?

7 A No, I did not.

8 Q Did you have signature authorities over the
9 checking account?

10 A Yes, I did.

11 Q And so if you had wanted to, you could have
12 written a \$1.2 million check and sent it in to
13 Allfirst?

14 A Yes, I could have.

15 Q Did Mr. Ortenzio have any reaction to your
16 refusal to write the check or make that payment?

17 A Initially when he had asked me about it and
18 I said no, he didn't do anything. Then at a later
19 point in time, he came back to me again and said I
20 know you don't agree with this; but I need to do it.
21 I said, you're the president of the company; but I'm
22 not going to be any part of it.

23 Q Did he at all elaborate on when he said I
24 need to do this, what he was meaning by this?

25 A He personally guaranteed the 1.2 million

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1 and he wanted that paid off because he had had his
2 personal guarantee.

3 Q Did you believe using the \$4 million line
4 of credit to repay the \$1.2 million guaranteed loan
5 was consistent with the agreement that CCI and
6 Allfirst had entered into when Allfirst gave the \$4
7 million line of credit?

8 MR. SWICHAR: I object to the form of the
9 question. She's not an attorney. You're asking her
10 to interpret legal documents which is the province of
11 the judge and not Ms. Phillips.

12 MS. JOYCE: Let me hear the question back.

13 (The reporter read back the referred-to
14 portion of the record.)

15 MR. SWICHAR: Let me renew my objection.
16 Consistent with the agreement it would require an
17 interpretation of the loan documents which is not the
18 proper function of Ms. Phillips. You may answer the
19 question.

20 BY MR. GEBHARDT:

21 Q You may answer the question.

22 A As chief financial officer and what I knew
23 of the loan documents, no, I did not think it was.

24 Q And would you explain why that was your
25 thought?

40

1 A Because I looked at the line of credit as
2 being a way for us to pay for our ongoing work in
3 progress and to pay our vendors and subcontractors.
4 And as far as I have recalled in prior notes, there
5 were certain things I thought we weren't allowed to
6 do. I know that it was in this one; but going to
7 another bank and getting additional loans, I thought
8 there were restrictions in there that prevented it.

9 MR. GEBHARDT: Let's mark this as the next
10 exhibit and also the next.

11 (Income statement was marked as Deposition
12 Exhibit No. 8.)

13 (Balance sheet was marked as Deposition
14 Exhibit No. 9.)

15 BY MR. GEBHARDT:

16 Q I've handed you what's been marked as
17 Deposition Exhibits 8 and 9, which appear to be
18 internally-generated financial statements for CCI
19 Construction for a 13-month period beginning in 1999,
20 January 1, I guess, Exhibit 8 being an income
21 statement and Exhibit 9 being the balance sheet.

22 Do you recognize these as
23 internally-generated financial statements?

24 A Yes, I do.

25 Q And you would have been involved at this

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1 time in the generation of these financial
2 statements --

3 MS. JOYCE: Object to the form of the
4 question. You may answer.

5 BY MR. GEBHARDT:

6 Q -- as supervisor of the accounting
7 department?

8 A Yes, I would have.

9 Q And would I be correct that after these
10 were generated, they were provided to Mr. Ortenzio?

11 A Yes.

12 Q And at the top of the page in the
13 right-hand corner, there's an indication 02-14-2000
14 14:05, is that a reference to when these statements
15 were printed out?

16 A Yes, it is.

17 Q Roughly how long after they were printed
18 out would it have been when you gave these to
19 Mr. Ortenzio?

20 A Probably within -- if he was in the office
21 and we did these, it would have been within a day or
22 two.

23 Q Now, the income statement, if you look at
24 the second page, would I be correct indicates --

25 MS. JOYCE: The second page of which

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1 exhibit?

2 MR. GEBHARDT: Of Exhibit 8.

3 BY MR. GEBHARDT:

4 Q -- that there is a net loss the company has
5 sustained of slightly over \$6 million?

6 A That's correct.

7 Q And did you have occasion to discuss with
8 Mr. Ortenzio that amount of loss of the company for
9 the 13-month period after these statements were
10 generated?

11 A Yes.

12 Q Would I be correct that there was a
13 12-month internal income statement also generated at
14 CCI? Would that have been the normal practice?

15 A That's the normal practice, but this
16 actually would have been the 12-month statement --
17 you mean because of the 13 months up there?

18 Q Yes.

19 A Thirteen months was how our accounting
20 system would give us time at the end of the year to
21 go into the next year so that you could do W-2s in
22 the prior year and keep it open for adjustments and
23 start your next year of business. So this was
24 actually for 12 months.

25 MS. JOYCE: Let me just make sure the

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1 record is clear. The witness is referencing Exhibit
2 No. 8.

3 MR. GEBHARDT: Thank you.

4 BY MR. GEBHARDT:

5 Q Prior to this document, which is Exhibit 8,
6 being generated, was it understood by you that CCI
7 for the fiscal year 1999 was going to sustain an
8 operating loss in the magnitude that's reflected on
9 the statement?

10 A Could you repeat that?

11 Q Right. I mean before February 14 when this
12 statement was printed out, did you have an
13 appreciation that the company was likely to sustain a
14 loss in the \$6 million area for the fiscal year 1999?

15 A Sometime prior to printing this, yes.

16 Q And based on your discussions with
17 Mr. Ortenzio and things he said to you, did he have
18 an understanding that the company was going to
19 sustain a loss for fiscal year 1999 in this area?

20 A Prior to this?

21 Q Yes.

22 A Prior to this, he would have -- if I can
23 back up. What generates the profits on the jobs are
24 reports that -- I'm sorry. What generates the profit
25 or loss on the income statement is information I got

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1 from operations projecting job profits or losses. At
2 the time those losses came in, they changed
3 drastically because they deceased.

4 At that time, I had constant conversations
5 with our chief operating officer. He would meet with
6 John, and I would meet with him sometimes together,
7 sometimes apart. This is the final result.

8 As we discussed that, we knew that it was
9 going to hit our bottom line in a big way as far as
10 an exact amount. We knew it was coming together for
11 a big loss.

12 Q And focusing on the February 11, 2000 date
13 on which Mr. Ortenzio delivered the CCI check to
14 Allfirst to pay the \$1.2 million loan, prior to that
15 date and based on your discussions and interactions
16 with Mr. Ortenzio, was he aware of the company's
17 financial situation that was going to result in a
18 loss somewhere in the magnitude reflected on Exhibit
19 8?

20 A Oh, yes.

21 Q And based on your discussions with him, did
22 his awareness of that -- did he express any
23 relationship between anticipating this loss and
24 wanting to get the \$1.2 million loan paid?

25 MS. JOYCE: You mean prior to February 11?

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1 Are you still in the same time frame?

2 MR. GEBHARDT: Yes.

3 THE WITNESS: Give me the question again.

4 BY MR. GEBHARDT:

5 Q Did Mr. Ortenzio in any way relate the
6 anticipated loss in the rough area of \$6 million to
7 getting the \$1.2 million loan repaid even if he had
8 to borrow on the line of credit?

9 A Yes.

10 Q Do you remember anything he may have said
11 to you in that regard?

12 A When we had these discussions, the chief
13 operating officer was Shane Miller; the president,
14 John; myself -- and I don't recall if the senior VP
15 was involved. I think it was probably just the three
16 of us.

17 Initially, when he talked about the
18 financial condition of the company, the chief
19 operating officer had said that in order to keep
20 going that the company would need more cash put into
21 it.

22 At that time, John had said he was not
23 going to put more cash into the company. That's when
24 in the meetings, Shane, our chief operating officer,
25 said, if you're not going to, we have serious

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1 problems. We need to talk to the bank and bonding
2 company.

3 At that time, we hadn't right then called
4 because it was an issue of whether John would put
5 more money into the company or not. And he had
6 decided that he wanted to pay off the \$1.2 million
7 prior to those discussions with going forward with
8 the bank or the bonding company.

9 Q Now, there was a meeting at Allfirst that
10 Mr. Ortenzio attended with various representatives
11 including Michael Zarcone and Craig Schwartz on
12 February 24, 1999, which was the Friday after
13 February 11, 1999, when the \$1.2 million line --

14 MS. JOYCE: The date is incorrect. I think
15 you might want to just change the year.

16 MR. GEBHARDT: 2000.

17 MS. JOYCE: Why don't we start the question
18 again so the form is correct for the witness?

19 BY MR. GEBHARDT:

20 Q There was a meeting held at Allfirst
21 attended by Mr. Ortenzio and various representatives
22 of Allfirst including Craig Schwartz and Michael
23 Zarcone on February 18, 2000, which was a Friday.
24 That's the Friday after February 11, 2000, when
25 Mr. Ortenzio delivered the check to pay the \$1.2

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1 million loan off.

2 Were you aware that that meeting at
3 Allfirst was going to occur prior to February 18,
4 2000?

5 MS. JOYCE: Assuming all that information
6 to be correct.

7 MR. GEBHARDT: Yes, and I think it's
8 without dispute in the litigation. I can represent
9 that to you.

10 THE WITNESS: At that point, John had
11 decided to meet with the bank himself; but yes, I
12 knew he was going to meet with the bank.

13 BY MR. GEBHARDT:

14 Q What did you understand was the purpose of
15 his meeting with the bank?

16 A To talk to them about our financial
17 condition of the company.

18 Q To your understanding, were you going to
19 make any request for financing or additional credit
20 or what was he going to do in the meeting?

21 A No. He had already said that he didn't
22 want to invest in the company anymore. He was
23 talking to them to say that here's where we are.
24 Here's our position; and at some point, I don't
25 remember the exact dates, but he had given a strong

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1 impression to us that he was not going to continue
2 with company.

3 Q Now, Mr. Ortenzio attended that meeting
4 with an attorney named Chernicoff. Do you know how
5 Mr. Ortenzio came in contact with Mr. Chernicoff?

6 A As I recall, he had told me that initially
7 he had talked to Leroy Zimmerman about being his
8 counsel. I thought there was a conflict of interest.
9 I wasn't involved in the conversations, but there was
10 a conflict of interest and that he was going to use a
11 bankruptcy attorney named Bob Chernicoff. I didn't
12 know him.

13 Q Did Mr. Ortenzio express to you that
14 Mr. Chernicoff was a bankruptcy attorney?

15 A I don't recall where I learned he was a
16 bankruptcy attorney. We had the discussion of
17 bankruptcy, and he hired Chernicoff. Whether he told
18 me he was a bankruptcy attorney, I don't know.

19 Q So you and Mr. Ortenzio had had discussions
20 regarding CCI's possible bankruptcy before the
21 February 18, 2000 meeting at Allfirst?

22 A Yes.

23 MS. JOYCE: Object to the form of the
24 question. That's fine.

25 MR. GEBHARDT: Let's mark this as the next

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1 exhibit.

2 (Cash flow projections were marked as
3 Deposition Exhibit No. 10.)

4 MS. JOYCE: Can we take a short break
5 before you get to that one?

6 MR. GEBHARDT: Sure.

7 BY MR. GEBHARDT:

8 Q I have handed you what has been marked as
9 Deposition Exhibit No. 10, which has been identified
10 in other depositions as a cash flow statement that
11 Mr. Ortenzio distributed at the meeting at Allfirst
12 on February 18, 2000. Do you recognize this
13 document?

14 A I do recognize it, yes.

15 Q Was this a document that you would have
16 been involved, at least in a supervisory capacity, in
17 having prepared?

18 A Yes.

19 Q Do you know whether this was prepared
20 especially for the meeting at Allfirst or just as a
21 general overall projection?

22 A The specific report, I don't recall; but we
23 did these projections on a normal basis.

24 Q Did you have any discussions with
25 Mr. Ortenzio prior to the February 18, 2000 meeting

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1 about the numbers that are reflected on this cash
2 flow statement that is Exhibit 10?

3 A Yes, actually -- oh, I'm sorry. Say that
4 again, the date.

5 Q Well, prior to the meeting with Allfirst,
6 did you have any discussions with Mr. Ortenzio about
7 what these numbers were and their consequences to the
8 company?

9 MS. JOYCE: Prior to the February 18th,
10 2000 meeting so the record is clear?

11 MR. GEBHARDT: Yes.

12 THE WITNESS: We discussed cash flow.
13 Whether it was this specific cash flow report, I
14 don't know. This does have John's writing on it.

15 BY MR. GEBHARDT:

16 Q Were there any discussions that you had
17 with Mr. Ortenzio about where the company was going
18 to come up with the money that it needed to make up
19 the cash flow shortfalls that are reflected on
20 Deposition Exhibit No. 10?

21 A I'm sorry. Could you repeat that? I saw
22 this FAX up here.

23 Q Did you have any discussions with
24 Mr. Ortenzio prior to the meeting at Allfirst where
25 the company was going to get the money to meet these

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1 cash flow shortages that are shown on Deposition
2 Exhibit No. 10?

3 A Yes, we did.

4 Q What was the substance of those
5 discussions?

6 A That -- which time frame are you looking?

7 Q Well, in other words, the cash flow
8 statement that's Exhibit 10 was generated in showing
9 these cash flow losses that are, at least in my view,
10 fairly significant.

11 Before he went to Allfirst, did you and he
12 discuss how the company was going to try and come up
13 with the money to meet the cash flow shortages?

14 A Yes. We had several meetings with myself,
15 the chief operating officer, Shane Miller, and John.

16 Q Did you have any specific meetings with the
17 anticipation of the February 18 meeting at Allfirst
18 to discuss it?

19 A We met to -- this was more of an ongoing
20 discussion. But when we got to -- I guess that's
21 what prompted the meeting on February 18th, the fact
22 that we had these serious cash flow concerns. We had
23 talked to John, and Shane said the only way -- we're
24 going to need you to put more money into the company
25 in some form in order to get through this until we

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1 get money back on these claims.

2 John refused to do that; and Shane said, if
3 we can't do that, we can't keep going forward. The
4 bonding company will have to step in, or we're going
5 to file bankruptcy or something.

6 We had several meetings discussing that,
7 and the likelihood of the company going forward was
8 slim at that point because John had said he was not
9 making any additional commitments.

10 At some point in time, we had found out
11 that the Scott Air Force Base was not going to come
12 in real quickly. We needed something at that point
13 in time. We discussed the longevity of the company
14 and the fact that we weren't going forward. That's
15 what prompted the discussions with Allfirst.

16 Q Did you know that this document, which is
17 Exhibit 10, was going to be distributed at the
18 meeting at Allfirst before the meeting?

19 MR. SWICHAR: I object because I think she
20 said she didn't recall the specific document.

21 BY MR. GEBHARDT:

22 Q Is that correct? You don't recall the
23 specific document?

24 MS. JOYCE: I don't think that was her
25 testimony. You can clarify your response.

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1 BY MR. GEBHARDT:

2 Q That's fine. I'm not trying to put words
3 in your mouth. If I --

4 MS. JOYCE: No. I think the
5 mischaracterization was from Mr. Swichar. I think
6 her statement was she did not recall whether Exhibit
7 No. 10 was prepared specifically for the meeting with
8 Allfirst on February 18th of 2000 or whether it was
9 prepared in the normal course of business.

10 THE WITNESS: But I do recognize this
11 document. But like I said, we prepared them on a
12 normal basis. So actually which one was a specific
13 one, we prepared these at least monthly, sometimes
14 more often during the month especially towards the
15 end.

16 BY MR. GEBHARDT:

17 Q Do you know whether or not based on your
18 discussions with Mr. Ortenzio and prior to February
19 18 he planned to disseminate this, Exhibit 10, to the
20 people at Allfirst at the meeting?

21 A He had a copy of this when he said he was
22 going to talk to the bank. That was probably the
23 first time he's ever met with our bankers by himself.
24 So what actually happened at that meeting, I don't
25 know. It's the first meeting I think that I had not

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1 been involved in especially because Dave wasn't
2 there.

3 Q Do you know why you weren't involved in
4 that meeting?

5 MS. JOYCE: Without guessing or
6 speculating.

7 THE WITNESS: No, I don't. We were
8 surprised about it afterwards.

9 BY MR. GEBHARDT:

10 Q If the meeting happened on a Friday,
11 roughly, when would you have learned that the meeting
12 was going to occur?

13 A I honestly can't recall exactly when I
14 learned of the meeting. Things happened pretty fast
15 in that last week when we notified -- we were going
16 to notify Allfirst and the bonding company both at
17 the same time; the bonding company, for whatever
18 reason, delayed the meeting. Allfirst, John met with
19 them right away.

20 Q Did you ask to go to the meeting?

21 A No.

22 Q Did you at all ask why you weren't being
23 invited to attend?

24 A Not that I recall.

25 Q Did you have any discussions with

55

1 Mr. Ortenzio about what he expected or anticipated
2 Allfirst's reaction was going to be in that meeting?

3 A We discussed calling Allfirst and the
4 bonding company. Both phone calls we discussed at
5 each meeting. They weren't separate for the bonding
6 company and the bank.

7 As I recall, when John set up the meeting,
8 it happened pretty quickly; and he went to the
9 meeting. Like I said, it happened pretty fast.

10 Q And as of the February 18, 2000, meeting
11 which was a Friday, you were aware at least as of
12 that Friday that Mr. Ortenzio had caused CCI to draw
13 on the \$4 million line of credit to repay the \$1.2
14 million loan preceding Friday?

15 A Yes, I was.

16 Q Were there any discussions about whether he
17 would or would not disclose that borrowing on the
18 line of credit to Allfirst at the meeting?

19 MS. JOYCE: Obviously, prior to the
20 meeting?

21 MR. GEBHARDT: Prior to the meeting, yes.

22 THE WITNESS: I don't recall if he said he
23 was going to.

24 BY MR. GEBHARDT:

25 Q Do you recollect after the meeting having

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1 any discussions reasonably following the meeting and
2 time-wise with Mr. Ortenzio about how he thought the
3 meeting went and so on?

4 MS. JOYCE: Object to the form of the
5 question in terms of and so on. You can answer.

6 BY MR. GEBHARDT:

7 Q Did Mr. Ortenzio tell you how the meeting
8 went in reasonable proximity to the time the meeting
9 occurred?

10 A I don't recall him being very detailed
11 about the meeting.

12 Q Now again, the meeting occurred on a
13 Friday; and I believe it was in the afternoon. Do
14 you know whether CCI wrote any checks or made
15 payments to creditors this succeeding week?

16 A I'm sorry. Which succeeding week?

17 Q In other words, February 18, 2000, was a
18 Friday; so was CCI still writing checks to its
19 vendors or payments to its vendors as of Monday?

20 MS. JOYCE: Monday the 21st of February
21 2000?

22 MR. GEBHARDT: Yes.

23 THE WITNESS: Yes, we were.

24 BY MR. GEBHARDT:

25 Q And do you know whether Mr. Ortenzio was

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1 aware that those checks were being written and
 2 payments were being made?
 3 A Yes, he was. He actually helped make
 4 selections as to who was being paid.
 5 Q Was it ever your understanding prior to
 6 February 18, 2000, that Mr. Ortenzio was meeting with
 7 the bank to discuss renewing the \$4 million line of
 8 credit?
 9 MS. JOYCE: Object to the form of the
 10 question.
 11 THE WITNESS: Could you repeat?
 12 BY MR. GEBHARDT:
 13 Q In other words, prior to the meeting -- the
 14 meeting occurred on February 18, 2000. Did you ever
 15 understand based on speaking with Mr. Ortenzio that
 16 he was attending the meeting to negotiate a renewal?
 17 A At the meeting on the 18th?
 18 Q At the meeting, yes.
 19 A No. That was not my understanding.
 20 MR. GEBHARDT: Just a minute. Excuse us.
 21 (Break.)
 22 MR. GEBHARDT: Just a couple quick points,
 23 and then we'll be done.
 24 BY MR. GEBHARDT:
 25 Q Looking back to your answer to the last

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1 question or couple questions, you indicated that
 2 Mr. Ortenzio, after the February 18, 2000 meeting
 3 with Allfirst, became involved in selecting which
 4 creditors would receive checks, I believe; is that
 5 correct?
 6 A That's correct.
 7 Q Prior to that time, had Mr. Ortenzio
 8 involved himself in a similar fashion in selecting
 9 who would or would not be paid?
 10 A He may -- I don't remember the exact time.
 11 He may have the week before or within the two weeks
 12 before; but prior to that in prior business, that was
 13 something he didn't get involved in, the day-to-day
 14 accounting.
 15 Q If I could, let me just ask you just a
 16 couple clarifying points that you might be able to
 17 help me with on the lower left-hand corner --
 18 MR. SWICHAR: Which number?
 19 MR. GEBHARDT: No. 10.
 20 BY MR. GEBHARDT:
 21 Q -- 2/16/00, that would have been the time
 22 this was printed off of the computer?
 23 MR. GEBHARDT: It's the cash flow. It's
 24 got Ortenzio 5.
 25 MS. JOYCE: Could we go off the record for

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1 a second?
 2 MR. GEBHARDT: Sure.
 3 (Off the record discussion.)
 4 BY MR. GEBHARDT:
 5 Q Looking at the bottom left-hand corner
 6 where it says 2/16/00 and then 7:08 p.m., would that
 7 be the time this was printed off the computer?
 8 A Yes.
 9 Q Looking up to the February column, are the
 10 numbers there as of February 1 or would they be as of
 11 February 28?
 12 A As I recall, the beginning cash balance, I
 13 think, was February 1; and the ending cash balance
 14 would have been February 28 in the first column. And
 15 then that carries forward to March, so that would be
 16 the beginning of March at the top of the column and
 17 the end of March at the bottom.
 18 Q Where it says the next line after ending
 19 cash balance, available line of credit \$5,200,000,
 20 would that also be a number reflected as of February
 21 28?
 22 A Yes. As far as I recall, that was what my
 23 projection was.
 24 Q The cash flow projection doesn't reflect
 25 the repayment of the \$1.2 million loan with a draw on

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1 the \$4 million line of credit?
 2 A No, it didn't.
 3 Q And based on your understanding of how the
 4 numbers work on this Deposition Exhibit 10, is there
 5 any way Allfirst could have learned by looking at
 6 this document that Mr. Ortenzio had caused CCI to
 7 borrow on the \$4 million line of credit to repay the
 8 \$1.2 million guaranteed loan?
 9 A No.
 10 MR. GEBHARDT: I have no further questions.
 11 MR. SWICHAR: Could we either take a
 12 15-minute break now or break for lunch. I'll have
 13 about an hour's worth.
 14 MS. JOYCE: It's the witness's call.
 15 THE WITNESS: If we could take about a 10-
 16 or 15-minute break now, then I could get back to
 17 work.
 18 MR. SWICHAR: Okay. Let's take 15 minutes.
 19 Thanks.
 20
 21 CROSS EXAMINATION
 22
 23 BY MR. SWICHAR:
 24 Q Ms. Phillips, I sort of want to trace some
 25 of the questions that you were previously asked

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1 beginning with Exhibit 2, which is the \$4 million
 2 note. Do you have that there?
 3 I believe you testified that you basically
 4 were responsible as far as the CCI was concerned for
 5 the changes that were reflected and initialed on the
 6 note with the possible exception of Item No. 6 in
 7 which Mr. Ortenzio had wanted a 30-day protection
 8 reflected in that note; is that correct?
 9 A Yes, that's correct.
 10 Q Knowing what you know now, did the bank
 11 provide that 30-day notice requirement for
 12 protection, as you called it, reflected in 6?
 13 MR. GEBHARDT: Objection.
 14 MS. JOYCE: I'm going to object to the
 15 form.
 16 BY MR. SWICHAR:
 17 Q If you understand, you can answer it.
 18 A Let me just read the paragraph again. What
 19 was your question?
 20 Q Did the bank, if you know, provide the
 21 30-day notice reflected in paragraph 6 when it
 22 entered a default or called a default under the note?
 23 A That's for repayment. I guess I don't know
 24 the situation that we had really applies directly to
 25 that.

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1 Q Pardon me. You don't know?
 2 A They didn't ask us to repay it.
 3 Q How about with respect to the declaration
 4 of default? Did the bank give a 30-day notice? Do
 5 you know?
 6 MR. GEBHARDT: Objection.
 7 THE WITNESS: No. I don't recall any such
 8 notice.
 9 BY MR. SWICHAR:
 10 Q Would you turn to the \$1.2 million note,
 11 which is your Exhibit 7, which I understand you
 12 didn't sign except as the attestation clause. Were
 13 you responsible in any way or were you involved in
 14 any way with respect to the changes initialed in the
 15 \$1.2 million note?
 16 A As I recall, John and I reviewed this note
 17 before he had signed it.
 18 Q And you recall having discussions with the
 19 bank and/or with Mr. Ortenzio with respect to the
 20 changes as, for example, the change reflected in the
 21 second paragraph on page 2 of the note, third
 22 paragraph, the second and third. I'm sorry.
 23 MS. JOYCE: Your question was, Did she
 24 discuss the contents of those --
 25 MR. SWICHAR: Was she involved in the

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1 changes in any way that is reflected on page 2 of the
 2 note?
 3 THE WITNESS: I had discussions with John
 4 about the changes.
 5 BY MR. SWICHAR:
 6 Q Did you have discussions with the bank?
 7 A About this note?
 8 Q About this note and the changes reflected
 9 therein.
 10 A I don't recall if I talked to them about it
 11 or if John did.
 12 Q Do you recall having any discussions with
 13 the bank or Mr. Ortenzio with respect to limiting
 14 Mr. Ortenzio's guarantee to the \$1.2 million note and
 15 thereby excluding the \$4 million note?
 16 A I do remember discussions about that.
 17 Q With whom were those discussions?
 18 A With John.
 19 Q Any with the bank?
 20 A As I recall, I think that that was
 21 discussed with the bank also.
 22 Q You were present at the signing when
 23 Mr. Ortenzio signed this?
 24 A Yes, I was.
 25 Q And were you present when the bank made the

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1 changes reflected on the note?
 2 A I don't recall that.
 3 Q What do you recall about the discussions
 4 with the bank insofar as limiting Mr. Ortenzio's
 5 guarantee to the 1.2 million in contrast to extending
 6 it to the \$4 million line?
 7 A Specifically that, that this was going to
 8 be written up as a separate note that would have his
 9 personal guarantee and his personal guarantee did not
 10 go to the \$4 million loan.
 11 Q Do you recall anybody at the bank
 12 verbalizing their acceptance of that apart from what
 13 is in the note itself apart from Mr. Schwartz?
 14 A Not that I recall.
 15 Q Now, we agree that the bank had three loan
 16 facilities: The \$4 million line of credit, the \$1.2
 17 million line note and the related surety, and the
 18 equipment note. Am I correct that CCI only had one
 19 checking account at Allfirst?
 20 MS. JOYCE: At any time or in 1999 and
 21 2000?
 22 MR. SWICHAR: 1999 and 2000.
 23 THE WITNESS: No, that's not correct.
 24 BY MR. SWICHAR:
 25 Q When did it have another checking account?

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1 A We had -- our accounts were tied together.
2 We had an account for our payroll, and we had an
3 account for our accounts payable. They were all tied
4 to the accounts payable. They were all tied but
5 handled in a different way.

6 In addition to that, we had a small account
7 for a cafeteria plan for money that was presented for
8 their medical health bills.

9 Q Which accounts were tied into the cash
10 management account, the one where moneys would be
11 swept?

12 A Accounts payable, payroll, and the line
13 itself.

14 Q All three -- all the checking accounts were
15 tied into the cash management?

16 A Yes, they were.

17 Q As far as you know, CCI had no checking
18 accounts elsewhere with another bank?

19 MS. JOYCE: At any time?

20 MR. SWICHAR: 1999/2000, unless I state
21 otherwise.

22 MS. JOYCE: I wasn't clear from your prior
23 questions, so that's fine.

24 THE WITNESS: Without thinking about it --
25 there may have been some other account for something

1 A It was Old Gettysburg Road.

2 Q Do you know why a separate account was set
3 up for that?

4 A I don't know if the account was just set up
5 for that or if John had a prior account he was using
6 because he had handled that, but he wanted to -- he
7 didn't want the money to be intermingled with what
8 Allfirst and the bonding company -- he didn't want
9 that money in that account that they made draws on.
10 He wanted to use that.

11 Q When you say at the very end he used that,
12 what do you mean?

13 MS. JOYCE: I don't believe that's what the
14 witness said at the very end. I don't believe that's
15 what she was referring to. You can go ahead and
16 clarify.

17 THE WITNESS: After the bank and after the
18 bonding company were aware of what happened and after
19 the bonding company got involved and basically took
20 over running the company during that time period, a
21 check for that one job came in or check or checks --
22 the deposits at that point in time, I think it was
23 one check. John put that into a different account.
24 BY MR. SWICHAR:

25 Q Was that after the bank froze the checking

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1 as far as our main transactions for accounts payable
2 and transactions -- they went through Allfirst.
3 BY MR. SWICHAR:

4 Q Were all accounts receivable or revenues
5 deposited in the checking account at Allfirst as far
6 as you know?

7 A Prior to --

8 Q 1999/2000, when money came in by either
9 wire transfer or checks, which I believe you stated
10 were the means by which funds were collected, were
11 they all deposited in the checking account at
12 Allfirst which was related to the cash management
13 facility?

14 A They used to be; but right at the end, John
15 had used another account.

16 Q Where was that account?

17 A I don't know. He had -- it was for a job
18 that wasn't bonded. They had a payment that he used
19 another checking account to pay some of the vendors
20 and one of the deposits into that account.

21 Q Was that at Allfirst or another bank?

22 A I'm sure it was another bank, but I don't
23 know which one.

24 Q Apart from that job -- do you recall which
25 job that was?

1 account at Allfirst?

2 A Yes, it was.

3 Q Going back to the Allfirst account, how
4 were interest payments on the equipment note paid?

5 A Interest payments on the equipment note?

6 Q Yes. Would they be automatic or were
7 checks written?

8 A As I recall, we wrote checks to pay that.

9 Q Monthly?

10 A Yes. We were billed. As I recall, we
11 actually got an invoice.

12 Q And those checks were written on the
13 Allfirst checking account?

14 A Yes, they were.

15 Q They were not swept?

16 A They were not swept automatically by the
17 bank.

18 Q Checks were written? I just want to make
19 sure. I don't know the answer.

20 A At the end of each day, the account -- all
21 the checks that were put against our account, that
22 money was taken out of any deposits that were put in.
23 If there was an under amount, it was drawn on the
24 line to cover that.

25 Q If there was an excess amount, wouldn't it

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1 reduce the balance on the \$4 million line of credit?

2 A If there was an excess amount, yes, it
3 would.

4 Q That's why I'm confused. You say it would
5 be invested. But it's my understanding, correct me
6 if I am wrong, that if there were excess funds in
7 that account, it would be deducted from any balance
8 owed on the \$4 million line of credit first?

9 A I think you're misinterpreting what I'm
10 saying. In the total picture, if, in the \$4 million
11 at the end of the day if we got deposits in of \$5
12 million, therefore, we had an extra million, that
13 would be invested.

14 If you're just looking at the deposits for
15 the day, it's applied against the line of credit.
16 But what I'm saying when I say that if there's an
17 overage amount, if our credit goes to zero, that it
18 would be invested.

19 Q That's what I thought. The investment part
20 of this transaction only occurs when there is nothing
21 due on the \$4 million line of credit --

22 A That's correct.

23 Q -- and the balance is zero?

24 A That's correct.

25 Q Otherwise, any moneys deposited in the

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1 checking account which would constitute a surplus
2 would be used to reduce the \$4 million line of
3 credit?

4 A That's correct.

5 Q Now, if interest payments are paid on the
6 equipment note, that would have an impact on the \$4
7 million line of credit, would it not?

8 A Yes, it would.

9 Q And what would that impact be?

10 A It would draw on the line of credit.

11 Q How about principal payments on the
12 equipment note? How are they paid?

13 A In the same fashion.

14 Q And that would also have the same impact on
15 the \$4 million line of credit?

16 A Yes, it would.

17 Q Okay. By the way, principal payments, were
18 they by checks or were they swept automatically by
19 the bank?

20 MR. GEBHARDT: Objection. Using -- I don't
21 know if you're using the term swept in a consistent
22 --

23 MR. SWICHAR: I'll rephrase it. Fair
24 objection.

25 BY MR. SWICHAR:

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1 Q Were the principal payments for the
2 equipment note paid by CCI checks; or were they
3 automatically deducted by the bank, by the checking
4 accounts, or none of the above?

5 A I don't recall if we were making -- I'm
6 just trying to remember if we made principal payments
7 or if we were making interest-only payments.

8 Q I will represent to you that I think it's
9 correct that there were principal payments on the \$2
10 million note.

11 A If we were making principal payments -- I
12 think they were; I just don't recall exactly -- if we
13 were making principal payments, they would be handled
14 the same way.

15 Q Which would be checks?

16 A Which would be checks.

17 Q And that would reduce the availability on
18 the \$4 million line?

19 A That's correct.

20 Q How about interest payments on the \$1.2
21 million note? How were they paid, by checks or
22 automatic deductions --

23 A As I recall --

24 Q -- or none of the above?

25 A As I recall, they were paid by check.

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1 Q And am I correct in saying, like the
2 equipment note payments, those payments would have
3 the effect of increasing the balance on the \$4
4 million line of credit?

5 A Yes.

6 Q Now, Ms. Phillips, were you present at the
7 table when the -- bank table when the \$1.2 million
8 note and related surety were signed and provided to
9 the bank? Were you there? --

10 A I don't recall if we actually got together
11 to sign it or if we got the loan documents, reviewed
12 them, signed them, and gave them to Craig Schwartz.

13 Q Did you have discussions with Mr. Schwartz
14 regarding the revisions that were made on the changes
15 that were made to the \$1.2 million note and surety?
16 You can look at them to refresh your recollection.

17 A I don't recall if I did. In prior loans, I
18 can honestly say that I had spoken to Craig Schwartz.
19 In this loan, John was very involved; so I don't
20 recall if I specifically talked to them or if John
21 did. This one was a little different.

22 Q If my notes are correct and the other
23 lawyers will account if they're not correct, you
24 testified you had discussions regarding how the \$1.2
25 million note would be repaid.

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1 I believe you testified that it was
2 anticipated that CCI would repay the 1.2 million from
3 cash flow that was projected if the projections held
4 true. Is that a fair statement?

5 A That's correct.

6 Q Now, with whom did you have those
7 discussions -- Mr. Ortenzio, the bank, or both?

8 A I definitely had the discussions with John;
9 and as I recall, we had those same discussions with
10 the bank also.

11 Q Am I correct in stating that the
12 projections that CCI was relying upon turned out not
13 to come to fruition?

14 A That's correct.

15 Q When the \$1.2 million note and related
16 surety was signed, did you believe those projections
17 to be capable of being fulfilled based on your
18 financial experience with the company?

19 A As I said, I had concerns; and when I had
20 talked to John about those projections, I said those
21 were based on what operations were projected for the
22 loss or profits on each of those jobs. I had pointed
23 out at that time that those profits and/or losses,
24 they were decreasing throughout the year.

25 Q Well, did you tell the bank at any time

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1 that you didn't expect the projections to be
2 accurate?

3 MS. JOYCE: Object to the form of the
4 question. You can answer.

5 THE WITNESS: Say it again.

6 BY MR. SWICHAR:

7 Q Did you ever tell the bank at or about the
8 time the \$1.2 million note was signed that you didn't
9 expect those projections that were going to be the
10 source of the payment to be accurate and true?

11 A I didn't say they weren't accurate or true.
12 What I said is -- when I gave them to John, I said,
13 this is what I've been given by operations.
14 Operations, in the past, has shown the profits on the
15 jobs decreasing; but as of that point in time,
16 information I gave to him, I said, that's the best
17 that I can do.

18 Q Did you believe those projections that
19 operations provided to you to be true and correct as
20 far as projections can go?

21 A I believed at that time that they were
22 given as true as they could project, yes.

23 Q When did you have discussions with the bank
24 regarding the \$1.2 million note where you said that
25 there were discussions that you had that you expected

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1 the note to be repaid from projected cash flow? When
2 did that occur?

3 A That's what I'm saying, I think -- I can't
4 guarantee that that discussion occurred with the bank
5 as to how we were paying it back. I know that John
6 and I discussed it. I think that that was in -- it
7 may have been part of the discussion with the bank,
8 but I can't recall that part. I can't recall
9 exactly.

10 Q You may have told the bank or there may
11 have been discussions with the bank at which you were
12 present that projected cash flow would be the source
13 of repayment.

14 I'm trying to find out whether or not you
15 have an actual recollection of that statement being
16 given to the bank by you or by Mr. Ortenzio in your
17 presence.

18 A And that's where I'm saying I just don't
19 have an exact recollection of that part of the
20 conversation.

21 Q Do you recall the bank ever requesting CCI
22 through you or Mr. Ortenzio including a provision in
23 the \$1.2 million note which would have required the
24 repayment to come from projected cash flow?

25 A Say that again.

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1 Q Would you -- do you have any recollection
2 of the bank ever stating to CCI, either to you or
3 Mr. Ortenzio, that it wanted to include a provision
4 in the \$1.2 million note that it could only be repaid
5 from projected excess cash flow?

6 A I don't recall that, no.

7 Q Do you recall the bank ever requesting a
8 provision in the \$1.2 million note which prohibited
9 -- which would have prohibited the repayment from the
10 \$4 million line of credit?

11 A I do not recall any conversation with the
12 bank of making a payment from the \$4 million line of
13 credit one way or the other.

14 Q One way or the other?

15 A Yeah.

16 Q Now, you've seen from the commitment
17 letters that the \$4 million note was due on April
18 30th of 2000; and the \$1.2 million note was due one
19 month earlier on March 31st, 2000.

20 I'm not going to have this remarked, but it
21 originally was Schwartz 6, if everyone agrees, which
22 appears to be an Allfirst memorandum dated November
23 2, 1999.

24 Just to put this in the proper context, Ms.
25 Phillips, if you look at Phillips 5, which you have

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1 in front of you, it's dated -- Schwartz 6 is dated
 2 two days earlier.
 3 A Okay.
 4 Q Now, this Schwartz 6 indicates that the
 5 bank initially contemplated increasing the \$4 million
 6 line to 5 million. Do you see that?
 7 A I do.
 8 Q And the \$1 million increase would expire on
 9 February 28th, 2000. Do you see that?
 10 A Yes.
 11 Q And it also indicates that Mr. Ortenzio
 12 would guarantee the entire \$5 million line of credit.
 13 Do you see that?
 14 A I see that.
 15 Q Do you recall any discussions that you
 16 participated in in the bank, with the bank where
 17 Mr. Ortenzio was requested to guarantee the \$5
 18 million line as reflected in Schwartz 6?
 19 A I don't remember this document.
 20 Q In fairness to you, you may never have seen
 21 this. I don't know. I'm only showing you this to
 22 refresh your recollection.
 23 MS. JOYCE: Your question to this was --
 24 MR. SWICHAR: I'll rephrase it since you
 25 made me forget what the question was.

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1 BY MR. SWICHAR:
 2 Q Do you recall how the changes reflected in
 3 the earlier document evolved into what ultimately
 4 became -- strike that.
 5 Do you recall any discussions with the bank
 6 that reflected a transaction -- the transaction in
 7 Schwartz 6, in other words, a \$5 million note fully
 8 guaranteed by Mr. Ortenzio to expire on February 28,
 9 2000?
 10 A I don't recall that part of the discussion,
 11 but I do know that John never agreed to guarantee the
 12 whole 5 million or the 4 million that we already had
 13 in place that was already in place.
 14 Q Do you recall the bank requesting
 15 Mr. Ortenzio to guarantee the full 5 million?
 16 A I don't.
 17 Q Do you recall that Mr. Ortenzio had
 18 initially requested a \$1 million loan in contrast to
 19 a 1.2 million?
 20 A No. I just don't recall. I'm looking at
 21 the difference in the two, but I don't recall this.
 22 Q Do you recall Mr. Ortenzio, on behalf of
 23 CCI, requesting that the 1 million or \$1.2 million
 24 note initially expired on February 28, 2000, in
 25 contrast to what ultimately turned out to be March

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1 31, 2000?
 2 A I don't know if this was something that
 3 John talked to them about previously. I just don't
 4 remember.
 5 Q Fair enough. If you turn to your Exhibit
 6 5, which is the Schwartz memo of 11/4/99, and that
 7 refers to a meeting that you did attend with
 8 Mr. Ortenzio and Mr. Schwartz and Mr. Zarcone.
 9 You'll notice that in the second paragraph,
 10 it states that the 1.2 million would be done on a
 11 temporary basis. Was that consistent with your
 12 understanding of the \$1.2 million note?
 13 A Yes.
 14 Q In contrast with the \$4 million line of
 15 credit which was longer term?
 16 A I understood the \$4 million to be a year;
 17 and as I said, we normally renewed it each year.
 18 Yes, this was definitely considered short term.
 19 Q A one-time note?
 20 A Yes.
 21 Q It also states that CCI would get an
 22 additional 500,000 from private sources. Do you
 23 recall any discussions about that?
 24 MS. JOYCE: It, referring to Deposition
 25 Exhibit No. 5, so the record is clear?

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1 MR. SWICHAR: Yes. Thank you.
 2 THE WITNESS: No, I don't recall that.
 3 BY MR. SWICHAR:
 4 Q Do you recall any discussions with the bank
 5 stating that it expected the \$4 million line of
 6 credit to be repaid before the 1.2 million?
 7 A No.
 8 Q Do you recall any discussions with the bank
 9 that it expected the \$4 million line of credit to
 10 reach a zero balance before the \$1.2 million line of
 11 credit could be repaid?
 12 A No.
 13 Q Now, we agree that the \$1.2 million loan
 14 was a short-term note?
 15 A Yes.
 16 Q And we agree that Mr. Ortenzio as you
 17 stated earlier told you specifically that he wanted
 18 the \$1.2 million to be a short-term note?
 19 A Yes, I do.
 20 Q And at the time it was repaid by CCI on
 21 February 11, 2000, there was no indication that there
 22 was any pending request to the bank to extend the
 23 \$1.2 million note, was there?
 24 A It didn't expire until March. I'm not sure
 25 I understand your question.

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1 Q As far as you know, was there any request
2 on the bank to extend the \$1.2 million note?
3 A To the bank to request that we extend the
4 note?
5 Q Yes.
6 A No.
7 Q And was there any indication as of February
8 11, 2000 -- there was no indication from the bank
9 that it had intended to extend the \$1.2 million
10 note --
11 A No.
12 Q -- am I correct?
13 A That's correct.
14 Q It was your understanding as of February
15 11, 2000, that the \$1.2 million note would have
16 expired in any event on March -- as of -- no later
17 than March 31 of 2000; is that correct?
18 A That's correct.
19 Q And that's in contrast to the \$4 million
20 note which you would have anticipated would have been
21 renewed at the end of April of 2000; is that correct?
22 A That was always our hope, and it was each
23 time.
24 Q It was a course of dealing; is that
25 correct?

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1 A Yes.
2 Q Now, you testified about your discussions
3 that you had with Mr. Ortenzio prior to the bank
4 meeting on February 18, 2000.
5 Am I correct in stating that Mr. Ortenzio
6 advised you that he did intend to go to the bonding
7 companies for financial help until moneys came in
8 from the Scott Air Force Base and other jobs?
9 A Yes, that's correct.
10 Q And there was a discussion about -- do you
11 recall -- if I recall correctly, you testified that
12 -- strike that.
13 Did Mr. Ortenzio ever state to you that
14 bankruptcy was an alternative prior to the meeting
15 with the bank or did he not or you had no
16 recollection?
17 A We discussed bankruptcy prior to that.
18 Q And was it Mr. Ortenzio's primary goal
19 first to go to the bonding companies and ask for
20 financial help until the Scott Air Force Base money
21 came in?
22 A That's what I recall.
23 Q Did Mr. Ortenzio tell you that the bonding
24 companies would have to come up with the money until
25 the moneys came in from the Scott Air Force Base and

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1 other jobs?
2 A I do recall that, yes.
3 Q And he said that he expected the bonding
4 companies to cooperate in that fashion?
5 A I don't know that he expected it from them,
6 but he was going to talk to them about that.
7 Q And as of the time you had the meeting with
8 Mr. Ortenzio prior to the February 18 meeting with
9 the bank, wasn't it indicated to you through
10 Mr. Ortenzio that it was his primary intention to
11 keep his company operating by getting funds from the
12 bonding companies until such time as the money from
13 the jobs came in?
14 A We had doubts about whether he wanted to
15 keep the company operating.
16 Q What was his primary goal, to get money?
17 MR. GEBHARDT: Objection. His primary goal
18 for what?
19 BY MR. SWICHAR:
20 Q To keep the company alive?
21 A What's the question?
22 Q Was his primary goal to keep the company
23 alive?
24 MR. GEBHARDT: Objection.
25 MS. JOYCE: If you know what his primary

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1 goal was.
2 BY MR. SWICHAR:
3 Q Based on your discussions with him?
4 A At that time, we had serious concerns as to
5 whether he did want to keep the company alive.
6 Q Do you recall on a certain date the bank
7 freezing the bank accounts of CCI?
8 A Yes, I do.
9 Q Do you recall when that occurred?
10 A Without looking back, I think it happened
11 -- actually, we found out on a Wednesday; but I think
12 it was actually frozen on a Tuesday night.
13 If I recall, based on the dates we've been
14 given here, I was thinking that it would be the
15 Wednesday after the 18th meeting.
16 Q A few days after the February 18th meeting?
17 A Yes.
18 Q Was there any warning by the bank that it
19 was going to freeze the accounts?
20 A Not to me.
21 Q What was the nature of the checks -- I'm
22 sorry. As a result of the bank freezing CCI's
23 checking account, were checks returned?
24 A Yes.
25 Q What was the nature of those checks?

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1 A It was our accounts payable to material
2 suppliers, vendors, subcontractors, payroll, all the
3 checks in the normal course of business that we had
4 written on the account.

5 Q Approximately what was the amount of the
6 payroll checks that were dishonored?

7 A I honestly can't recall. It was all the
8 checks from the last payroll at that time.

9 Q Can you give any approximation of the
10 dollars that that would be?

11 A My -- I don't recall the actual payroll
12 numbers.

13 Q Do you recall the number -- I'm sorry. Do
14 you recall the number of employees who didn't receive
15 their paychecks as a result of the bank freezing the
16 account?

17 A The number, no; but it was significant. I
18 just don't recall the number. We had -- the reason
19 I'm not recalling is because we had started laying
20 people off so the numbers were changing as people
21 were being laid off, the payroll numbers were getting
22 lower in that time period. I don't remember how many
23 we had left, but it was a significant number.

24 Q Well, significant number -- let me try to
25 bring you down. Over a hundred?

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1 A I would say probably over a hundred.

2 Q I don't mean to play games. Bigger than a
3 breadbasket? Between 150 and 200?

4 A I can't recall.

5 Q Is a hundred your best guess?

6 MS. JOYCE: Best estimate, because if it's
7 a guess, I'm not going to allow her to guess.

8 BY MR. SWICHAR:

9 Q Is that your best estimate? If you can't,
10 you can't. I just want a general idea. Over a
11 hundred?

12 A I would say over a hundred.

13 Q Now, the \$1.2 million note was repaid from
14 the \$4 million line of credit on February 11, 2000.
15 We agree on that.

16 At any time, did the bank ever come to you
17 as CFO and ask CCI to sign a document that would have
18 precluded payment from the \$4 million line of credit?

19 A Not that I recall.

20 Q As CFO, did the bank ever demand any
21 agreement from CCI that would make the \$4 million
22 line of credit a prohibited source of funds to repay
23 the \$1.2 million note?

24 MR. GEBHARDT: Objection.

25 BY MR. SWICHAR:

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1 Q You can answer.

2 A No.

3 Q Now, when the bank lent the 1.2 million,
4 changing thoughts now, there was a point in time when
5 the bank lent CCI the \$1.2 million in funds. That
6 money was deposited in CCI's checking account; is
7 that correct?

8 A That's correct.

9 Q And that was the same checking account that
10 was tied into the cash management facility; is that
11 correct?

12 A That's correct.

13 Q And that had the impact of increasing the
14 availability on the \$4 million line of credit by \$1.2
15 million; is that correct?

16 A That's correct.

17 Q And similarly it had had the impact of
18 decreasing the loan balance on the \$4 million line of
19 credit; is that correct?

20 A That's correct.

21 Q Now, let's move ahead in time. When the
22 \$1.2 million loan was repaid by drawing on the \$4
23 million line, a check was drawn on the checking
24 account; is that correct?

25 A When the 1.2 --

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1 Q Was repaid -- we're now moving ahead to
2 February 11th. The \$1.2 million loan was repaid by a
3 CCI check; is that correct --

4 A That's correct.

5 Q -- from the same checking account that we
6 just spoke of; is that correct?

7 A That's correct.

8 Q And that had the impact of increasing the
9 balance on the \$4 million line of credit; is that
10 correct?

11 A That's correct.

12 Q And since you're a CFO, I'll ask you this
13 question: The repayment of the \$1.2 million note had
14 the effect of reversing what occurred months earlier
15 when the 1.2 million was first lent to CCI with
16 respect to the \$4 million line of credit?

17 A That's correct.

18 Q Now, did the bank, in any fashion, monitor
19 CCI's use of the \$4 million known proceeds? Would
20 they ask you daily or weekly, what are you doing with
21 our money?

22 A We were required to give them reports.
23 It's in the documents here, if I looked at them; but
24 we had to give them an income statement, balance
25 sheet, accounts receivable, aging work in progress.

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1 Q Would those reports actually show the
2 payees, for example, of the proceeds of the \$4
3 million line of credit, where the moneys went
4 specifically?
5 A No. Specific to where it went, no.
6 Q Did the bank ever audit those requests,
7 those reports?
8 A That I gave them on a monthly basis?
9 Q Yes.
10 A I don't know what they did with them. I
11 just gave them to them.
12 Q Did they ever ask you for a list of payees
13 as to where the loan proceeds went?
14 A Prior to them freezing the account?
15 Q Yes.
16 A No, they did not.
17 Q By the way, when they froze the account, is
18 that when they first requested a list of payees?
19 A I don't recall if they did that or not. I
20 know they did before, but I don't recall if they
21 requested it.
22 Q Did the bank ever ask you to provide a list
23 of payees who would have received any of the proceeds
24 of the \$1.2 million note?
25 A No, they didn't.

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1 Q Do you recall a couple of days after
2 February 11, 2000, Mr. Schwartz came to CCI with the
3 \$1.2 million note and surety and returned it as
4 satisfied to CCI?
5 A I don't recall that.
6 Q Do you recall speaking to Mr. Schwartz at
7 any time after the \$1.2 million note was repaid?
8 A Yes, I do.
9 Q And were those discussions with respect to
10 the repayment of the 1.2 million?
11 A No. What I recall was regarding the
12 collateral --
13 Q Let me interrupt.
14 MS. JOYCE: Let her finish.
15 BY MR. SWICHAR:
16 Q Before the freezing of accounts, did you
17 have discussions with Mr. Schwartz before the
18 accounts were frozen?
19 MS. JOYCE: Do you want her to finish her
20 answer for the last question because you interrupted
21 her?
22 MR. SWICHAR: Yes. And I did that
23 intentionally because I wanted to clarify the
24 question.
25 MS. JOYCE: Okay. I wasn't aware the

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1 question needed clarification.
2 MR. SWICHAR: Well, in my mind, it did.
3 MS. JOYCE: That's fine.
4 MR. GEBHARDT: It's the witness's answer
5 though.
6 BY MR. SWICHAR:
7 Q My question is: Did you have any
8 discussions with Mr. Schwartz regarding the repayment
9 of the \$1.2 million note prior to the bank freezing
10 CCI's account?
11 A I don't recall if we did or not.
12 Q Do you recall Mr. Schwartz ever asking you
13 what the source of the repayment funds were with
14 respect to the \$1.2 million note?
15 A I don't recall. I remember the bonding
16 company asking that question, but I don't recall if
17 Craig Schwartz did.
18 Q Well, as of February 11th or prior thereto,
19 was Mr. Schwartz aware of the bank's -- of CCI --
20 strike that.
21 Was Mr. Schwartz aware of CCI's increasing
22 financial distress?
23 MR. GEBHARDT: Objection.
24 THE WITNESS: Increasing since we met in
25 November or -- I'm not sure what time frame.

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1 BY MR. SWICHAR:
2 Q Yes. Well, as of November, was
3 Mr. Schwartz aware that CCI was incurring financial
4 problems?
5 A As of November, they realized we had cash
6 flow difficulties.
7 Q Between November and February 11th, did you
8 have any other discussions with Mr. Schwartz
9 regarding CCI's financial difficulties?
10 A Not that I recall. It would have been
11 right around that time where I would have been giving
12 him the information from the end of the year.
13 Q Would that have been before or after
14 February 11th, 2000?
15 A I don't recall that we gave the information
16 prior to -- if John gave it to them.
17 Q And you don't recall Mr. Schwartz asking
18 you, as CFO, how did CCI come up with this \$1.2
19 million?
20 A No, I didn't.
21 Q Did you suspect that Mr. Schwartz at any
22 time knew the source of repayment?
23 MR. GEBHARDT: Objection.
24 MS. JOYCE: Object, and do not answer.
25 BY MR. SWICHAR:

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1 Q Do you have any reason to believe -- strike
2 that.

3 Did you have any reason to believe back in
4 the year 2000 that Mr. Schwartz knew the source of
5 the repayment of the \$1.2 million note?

6 MR. GEBHARDT: Objection.

7 MS. JOYCE: Same objection. You're asking
8 for beliefs. If she has concrete knowledge, she's
9 here to tell you that. Whether or not she believed
10 or didn't believe is not relevant.

11 MR. SWICHAR: I don't think it's for you to
12 decide what's relevant. I think that's for the
13 court. But be that as it may, I'm entitled to her
14 belief. That's a very fair question.

15 MR. GEBHARDT: She's not -- she doesn't
16 know what is in that man's head.

17 MS. JOYCE: Exactly.

18 MR. SWICHAR: Well, that's my next
19 question. Don't anticipate the next question. I'm
20 not asking her if she was able to read Mr. Schwartz's
21 mind. I'll ask it a different way.

22 BY MR. SWICHAR:

23 Q Are you aware of any facts that led you to
24 believe that Mr. Schwartz was aware of the source of
25 the repayment of the \$1.2 million note?

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1 A At what point in time?

2 MR. GEBHARDT: She knows today, for
3 instance.

4 BY MR. SWICHAR:

5 Q In February of 2000 and thereafter.

6 MS. JOYCE: Well, I think you have to limit
7 it between February of 2000. I don't mean to be
8 obstruct, Mr. Swichar; but --

9 MR. SWICHAR: Well, you are.

10 MS. JOYCE: Well, no, I'm not, because your
11 question is not fair to this witness. She left that
12 company in May of 2000, and her testimony gave you
13 that factual piece of information.

14 MR. SWICHAR: I'll rephrase the question.

15 MS. JOYCE: I would like to finish my
16 objection so we have a clear record for the court.

17 MR. SWICHAR: Go ahead, but don't accuse me
18 of misleading the witness. I'll clarify it; but if
19 you want to give a speech, go ahead.

20 MS. JOYCE: The witness's testimony was
21 that she left the company in May of 2000. Your
22 question to her was unfair in the sense that it was
23 open-ended and asked from any time from February of
24 2000 to the present what Mr. Schwartz did or did not
25 know. That's the basis for my objection.

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1 I understand you're going to rephrase the
2 question, and I don't have to instruct her not to
3 answer that one at this point. Go ahead and
4 rephrase, please.

5 BY MR. SWICHAR:

6 Q As of the time you were at CCI after
7 February 11, 2000, until the date that you left, were
8 you aware of any facts which led you to believe that
9 Mr. Schwartz was aware of the source of the repayment
10 of the \$1.2 million note?

11 A Yes.

12 Q Of what facts are you aware?

13 A Any time after February 11th. I don't know
14 exactly when he found that out; but at some point
15 after that, I know that he was aware of it.

16 MR. GEBHARDT: The whole bank found out at
17 that, for God's sake.

18 BY MR. SWICHAR:

19 Q How did you become aware that Mr. Schwartz
20 was aware of the source of repayment?

21 A I had one meeting -- I'm trying to remember
22 exactly when it was, but I had one meeting with Craig
23 and someone else from Allfirst that had come into my
24 office.

25 They were asking questions about the

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1 collateral, and I had given them some information
2 regarding the collateral. At that time, they were
3 aware of it; but I don't recall the date of that
4 meeting. It was definitely after February 18th; but
5 I -- as I recall, it was sometime in the next week.
6 I don't recall of an exact time he showed up in his
7 office.

8 Q Thanks. Let's focus on the Scott Air Force
9 claim which was, how much, 4 million?

10 A Over 4 million.

11 Q What was your understanding of that claim?

12 A My understanding of it was that there was a
13 meeting that was held during the time the Persian
14 Gulf War was occurring where there were people -- I
15 was not in attendance, but there were people from CCI
16 at a meeting. There was a general there.

17 We were told that Scott Air Force Base was
18 going to be the premier Air Force Base to be used for
19 the hub for the war. They needed to accelerate the
20 project. If we did not accelerate the project, they
21 would have to default us on our contract.

22 If we did go forward on it, we would have
23 to eat the cost and put it in as a change order or
24 claim at the end when we finished the job. We were
25 worried at that time of the effect of having it on

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1 our record, that we had a project here that if we did
2 not complete it, it would hinder us in getting future
3 projects.

4 We had made the decision to go forward, and
5 that decision cost us a lot of money that we did not
6 get paid.

7 Q Did you believe the \$4 million claim to be
8 a valid claim with respect to Scott Air Force Base?

9 A Yes, I did.

10 Q And did you believe -- strike that.

11 You're familiar to a certain extent with
12 the Albemarle Prison claim of \$2 and a half million?

13 A I'm familiar there was a claim, yes.

14 Q Did you believe that to be a valid claim of
15 CCI?

16 A Yes. From everything our chief operating
17 officer told me, I would say yes.

18 Q And is it fair to say that as of February
19 18th, 2000, you believed to the extent you could from
20 information you had obtained that such claims were
21 valid, the Scott Air Force Base and the Albemarle
22 Prison claim?

23 A Yes.

24 Q Now, if you turn to Exhibit 10, which is a
25 cash flow projection, next to the last line on the

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1 left, available line of credit. Let me just --
2 strike that.

3 When was Exhibit 10 shown to the bank, if
4 at all?

5 MS. JOYCE: By her?

6 MR. GEBHARDT: Objection.

7 BY MR. SWICHAR:

8 Q Do you know if Exhibit 10 was ever given to
9 the bank?

10 A I don't recall actually handing it to them,
11 no.

12 Q Do you recall when this document was
13 prepared?

14 A Yes, I do.

15 Q When was that?

16 A Printed as of February 16th. It was
17 probably prepared prior to that.

18 Q Now --

19 A And again, I prepared these on a regular
20 basis.

21 Q Now, going down to the available line of
22 credit, do you see that on the left, line of credit?

23 A Yes.

24 Q Am I correct that it reflects that the line
25 of credit as of February was \$5.2 million, correct?

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1 A Yes, that's correct.

2 Q And am I correct that if we then go into
3 March, we see that the line of credit was reduced by
4 the 1.2 million, i.e., to 4 million; is that correct?

5 A That's correct.

6 MR. SWICHAR: If I could have a minute with
7 my client, that may be my last question. If I may
8 just ask one more question.

9 BY MR. SWICHAR:

10 Q I want to get back to the situation where
11 the bank froze CCI's account. Were there situations
12 where the bank had clear checks of CCI but then
13 reversed those clearings?

14 A Yes, there were.

15 Q Tell me what that is about.

16 A We had -- in my computer system, I had a
17 tie-in to Allfirst that would show the activity in
18 our accounts. I could see what was going through
19 there on a daily basis.

20 I had seen the checks that had cleared, and
21 we started seeing -- I could see it on our reports
22 that it was taken out of our account as a clear
23 check, and then I started seeing it going back as
24 though it didn't clear.

25 I started seeing those reports. I said,

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1 they're going back in time. If I recall correctly --
2 as I said, I think Wednesday is when I had found out
3 the accounts were frozen. I think they went back as
4 far as Monday and uncleared checks that had shown as
5 clear on our account.

6 Q Do you recall those payees?

7 MS. JOYCE: Of which the checks were
8 reversed you mean?

9 MR. SWICHAR: Yeah.

10 THE WITNESS: Again, it was any check that
11 we had written. It was employees. It was vendors.
12 It was subcontractors. It was utility payments.

13 Q Do you recall if one check was to the IRS?

14 A I recall several checks that had to do with
15 payroll-type issues. I don't if it was IRS. I think
16 there was unemployment. I don't remember exactly
17 what it was, but there were payroll-type of issues.

18 It could have been the IRS. In fact, as
19 I'm speaking about it, Wednesday usually was the day
20 that we did that through a funds transfer. So that
21 probably was one.

22 Q An IRS check?

23 A Yes.

24 Q How about Cleveland Brothers? Was that
25 another check that was honored and then reversed?

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1 A Yes, I do believe that's true.
 2 Q Who was Cleveland Brothers?
 3 A Cleveland Brothers was a large equipment
 4 supplier for us. We bought a lot of the equipment,
 5 and they did repairs on the equipment.
 6 Q Do you recall the amount of the IRS check
 7 that was honored and then reversed?
 8 A I don't think it was a check. I don't
 9 recall the amount. I don't recall if it was a check.
 10 I think at that point in time that it was
 11 automatically taken.

12 MR. SWICHAR: Larry, you're champing at the
 13 bit.

14 MR. GEBHARDT: I just wanted to get done.

15 REDIRECT EXAMINATION

16 BY MR. GEBHARDT:

17 Q If you look at Exhibit 6, which is the
 18 commitment letter for the \$1.2 million loan, on the
 19 first page, the next to the last paragraph, you'll
 20 see a statement saying that the \$1.2 million loan is
 21 due and payable on March 31 of 2000. Do you see
 22 that?

23 A I do.

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1 Q And if you look at Exhibit 10, the cash
 2 flow statement, my question is: Is the reason the
 3 available line of credit is reduced from February's
 4 5.2 million to March's \$4 million, the March 31, 2000
 5 due date of the \$1.2 million loan?

6 A Yes, it is.

7 Q Now, turn, if you would, to Exhibit 1,
 8 which is the commitment letter for the \$4 million
 9 line of credit.

10 MR. SWICHAR: I'm sorry. What exhibit?

11 MR. GEBHARDT: Exhibit 1.

12 MR. SWICHAR: Okay.

13 BY MR. GEBHARDT:

14 Q Now, going down to the line, Use of
 15 Proceeds, you see it says finance work in progress
 16 and accounts receivable. I think you've indicated
 17 you understood that to be the purpose of the \$4
 18 million line of credit; is that right?

19 A That's correct.

20 Q Now, accounts receivable would mean the
 21 accounts that CCI had billed its customers but which
 22 its customers had not as yet paid buy were due and
 23 owed to CCI?

24 A That's correct.

25 Q So CCI would not have had that money

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1 available to it to pay its month-to-month expenses,
 2 right?

3 A That's correct.

4 Q And the line of credit would be used to
 5 fill in the gap until the actual customers made their
 6 payments to CCI?

7 A That's right.

8 Q And while were talking about finance work
 9 in progress, what that means is the normal monthly
 10 expenses of CCI in doing its construction work?

11 A That's correct.

12 Q Now, as a chief financial officer, would it
 13 be consistent with your understanding of a line of
 14 credit that's used to finance accounts receivable and
 15 work in progress to use the line to make the normal
 16 monthly interest payments on borrowings?

17 A Yes, it would.

18 Q Would it also be consistent with that
 19 purpose to make the normal monthly principal
 20 amortizations on loans that required monthly
 21 principal payments?

22 A Yes, it would.

23 Q But it would be inconsistent to completely
 24 prepay all principal and interest on a loan that was
 25 not yet due?

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1 A I agree with that. That's correct.

2 Q Now, if you look at the second page,
 3 numbered paragraph 8, there's a statement there that
 4 advance --

5 MR. SWICHAR: What exhibit?

6 MR. GEBHARDT: Exhibit 1.

7 BY MR. GEBHARDT:

8 Q Exhibit 1, numbered paragraph 8 on page 2,
 9 it says, Advances not to exceed 85 percent of
 10 qualified accounts receivable less than 90 days past
 11 due excluding retainages. Do you see that?

12 A Yes. It says 80 percent.

13 Q Paragraph 8, Advances not to exceed 80
 14 percent of qualified accounts receivable less than 90
 15 days past due, comma, excluding retainages, right?

16 A That's right.

17 Q Now, what that means is that's a limit on
 18 the amount of money that CCI could borrow under the
 19 line of credit; is that right?

20 A That's correct.

21 Q So even though it was a \$4 million line of
 22 credit, if CCI only had \$2 million of accounts
 23 receivable that were less than 90 days past due, CCI
 24 could not borrow \$4 million?

25 A That's correct.

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1 Q And would I be correct that in November --
2 excuse me.

3 A If I could just add to that. If we would
4 have gone above that, we would have been in default
5 of our loan.

6 Q Now, when this commitment -- excuse me. In
7 November when the \$1.2 million loan was taken out and
8 so on, the Scott Air Force Base receivable was not a
9 qualified account receivable, was it?

10 A No, it wasn't.

11 Q Because it was past 90 days due?

12 A That's right.

13 Q And that would be the same for the
14 receivables due from the Albemarle job?

15 A That's right.

16 Q So you couldn't use either Scott Air Force
17 Base or Albemarle in determining the amount of
18 borrowing CCI was able to do under the line of
19 credit?

20 A That's right.

21 Q And I think you had indicated that on a
22 monthly -- did you indicate on a monthly basis you
23 would provide the bank with accounts receivable
24 agings?

25 A Yes, I did.

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1 Q And would it be correct to say that when
2 CCI wrote a check drawing on its line of credit in --

3 MR. SWICHAR: Well, I'm going to object to
4 these leading questions. Why don't you ask her in
5 not a leading way?

6 BY MR. GEBHARDT:

7 Q When a check -- when the check was written
8 on February 11, 2000 as a draw on the \$4 million line
9 of credit to repay the \$1.2 million loan, was there
10 sufficient borrowing availability under paragraph 8
11 on page 2 for that borrowing to be made?

12 A I can't answer that without looking at
13 numbers from statements back then.

14 Q Was it your belief back then that that
15 formula -- that the payment could be made and still
16 be consistent with the borrowing base formula?

17 MR. SWICHAR: Objection. She already said
18 she can't state that.

19 BY MR. GEBHARDT:

20 Q But you would agree --

21 MR. SWICHAR: Objection to form.

22 MR. GEBHARDT: I haven't said the question
23 yet.

24 MR. SWICHAR: But when you start out with
25 that -- come on.

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1 BY MR. GEBHARDT:

2 Q You would agree that if the eligible
3 accounts receivable were not of a sufficient
4 magnitude to authorize a borrowing of the \$1.2
5 million on February 11, that borrowing would not be
6 an authorized borrowing under the terms of the
7 commitment?

8 MS. JOYCE: Object to the form. Go ahead.

9 BY MR. GEBHARDT:

10 Q If there wasn't sufficient borrowing
11 availability, then the \$1.2 million check that was
12 written would be in default, wouldn't it?

13 A That's correct. It doesn't mean it
14 wouldn't clear. It just means we would be into
15 default of our loan.

16 Q Now, if the \$4 million line of credit had
17 been increased by \$1 million to \$5 million back in
18 November of 1999 with the \$1 million increase
19 guaranteed by Mr. Ortenzio, the line of credit could
20 not have been used to repay the amount of the
21 increase, could it?

22 MR. SWICHAR: I object to the question.
23 Can I hear it back, please? I object to the form.

24 MR. GEBHARDT: Wait a minute. If you've
25 objected, the witness understands the question, then

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1 she can answer. You don't need to hear it again
2 unless you need to hear it.

3 THE WITNESS: I need to hear it.

4 MR. SWICHAR: If I don't understand it --

5 MR. GEBHARDT: That's all right. As long
6 as the witness understands it, you don't -- it's not
7 necessary that you do.

8 MR. SWICHAR: That's why I wanted to hear
9 it read back so I can see if I understood it.

10 MR. GEBHARDT: Okay. Read it back.

11 (The reporter read back the referred-to
12 portion of the record.)

13 MS. JOYCE: Do you understand the question?

14 THE WITNESS: I do understand it. We would
15 be writing a check and putting it back in the same
16 account.

17 MR. SWICHAR: I can't hear you.

18 THE WITNESS: I said, no, you couldn't.
19 You would be writing a check on the same account. It
20 would still have the same balance.

21 BY MR. GEBHARDT:

22 Q Now, as a final question, you were asked
23 some questions about the fact that the \$1.2 million
24 was advanced into the CCI account and used to pay
25 down the \$4 million line of credit balance. Do you

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1 recollect those questions?
 2 A Questions about --
 3 Q Yes.
 4 A Yes.
 5 Q And the two -- the loan, the \$4 million
 6 line of credit and the loan both bear the same
 7 interest rate?
 8 A That's correct.
 9 Q So there was no practical effect of
 10 disbursing the \$1.2 million and paying down the \$4
 11 million or simply holding the \$1.2 million back until
 12 it was drawn, was there?
 13 A That's correct.
 14 Q Based on your understanding as the person
 15 who negotiated the \$4 million line of credit and
 16 executed the loan documents, was the draw on the line
 17 of credit by way of a check of \$1.2 million to repay
 18 the \$1.2 million guaranteed separate loan a borrowing
 19 made, quote, to finance work in progress and accounts
 20 receivable, period, end quote?
 21 A No, it wasn't.
 22 Q So therefore, in your view, it was not an
 23 authorized borrowing under the line of credit?
 24 MR. SWICHAR: Objection to form.
 25 BY MR. GEBHARDT:

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1 Q In your view, was the borrowing authorized
 2 under the terms of the line of credit?
 3 MR. SWICHAR: Objection to form. Objection
 4 to the word authorized. I don't think it's within
 5 her promise to interpret the documents.
 6 MS. JOYCE: I think you're asking her for
 7 an expert witness answer.
 8 BY MR. GEBHARDT:
 9 Q Let me just say, based on your
 10 understanding as the person who negotiated and
 11 executed the \$4 million loan and loan documents, was
 12 the draw of \$1.2 million to pay the personally
 13 guaranteed loan and authorized borrow?
 14 MR. SWICHAR: Objection to form. Same
 15 reason.
 16 BY MR. GEBHARDT:
 17 Q Permitted under the terms of the loan?
 18 MR. SWICHAR: Objection to form. You're
 19 asking her to interpret legal documents.
 20 MR. GEBHARDT: All right.
 21 BY MR. GEBHARDT:
 22 Q You may answer.
 23 A No, I don't.
 24 MR. GEBHARDT: All right. That's it.
 25 MR. SWICHAR: No, it's not it. I have a

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1 few questions more.
 2 MR. GEBHARDT: It never ends.
 3
 4 RE CROSS EXAMINATION
 5
 6 BY MR. SWICHAR:
 7 Q Ms. Phillips, Exhibit 10, you stated the
 8 reduction in the line of credit from 5.2 to 4 was
 9 based on the assumed repayment of a \$1.2 million
 10 note; is that correct?
 11 A Yes.
 12 MS. JOYCE: Object to the form.
 13 BY MR. SWICHAR:
 14 Q And the answer is yes?
 15 A Yes.
 16 Q And what was assumed occurred on February
 17 11th, 2000; is that correct?
 18 A Say that again.
 19 Q In other words -- let me ask it a different
 20 way. When you prepared Exhibit 10, you had assumed
 21 that the \$1.2 million note would be repaid by the
 22 following month; is that correct?
 23 A That's correct.
 24 Q You had assumed that by March, the \$1.2
 25 million note would be repaid?

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1 A I assumed that it wouldn't be available
 2 anymore.
 3 Q That the short-term note would have
 4 expired; is that correct?
 5 A That's correct.
 6 Q Now, Exhibit 1, the loan commitment letter.
 7 With respect to the 4 million and specifically the
 8 paragraph dealing with use of proceeds to finance
 9 work in progress, etc., do you have any reason to
 10 believe that until the money -- until the \$1.2
 11 million note was repaid, the funds were used for any
 12 purpose other than as stated in Exhibit 1?
 13 A Not that I recall. I thought they were all
 14 for that purpose.
 15 Q Based on your understanding of the loan
 16 documents as CFO, was there any provision in Exhibit
 17 1 that prohibits -- strike that.
 18 That deals specifically with repayment
 19 terms and the source of funds that could be used to
 20 pay the \$1.2 million note?
 21 MS. JOYCE: Let me make an objection on the
 22 record because the document speaks for itself.
 23 That's the same objection that Mr. Burke made on
 24 Mr. Ortenzio's behalf at his deposition with respect
 25 to the contents of the exhibit. So the document

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1 speaks for itself. You can answer, and you did; so
 2 that's fine.
 3 BY MR. SWICHAR:
 4 Q If you go to the \$1.2 million note loan
 5 commitment, which is Exhibit 6, up until the time of
 6 the repayment of the \$1.2 million note, do you have
 7 any knowledge of the proceeds being used for other
 8 than finance work in progress in accounts receivable?
 9 A Not that I recall.
 10 Q And is it prohibited -- does Exhibit 6 deal
 11 specifically in any fashion with respect to the
 12 source of funds that could be used or that could not
 13 be used to repay the \$1.2 million note?
 14 MS. JOYCE: Same objection. You may
 15 answer.
 16 THE WITNESS: Not that I see.
 17 BY MR. SWICHAR:
 18 Q Now, if you go back to Exhibit 1, that had
 19 the eligibility formula with respect to the
 20 borrowings on the \$4 million note; is that correct?
 21 A Are you referring to --
 22 Q To the 80 percent, yes.
 23 A Yes.
 24 Q Now, if you turn to Exhibit 6, the last
 25 paragraph on page 1 has the same eligibility formula;

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1 is that correct?
 2 A That's correct.
 3 Q So the \$1.2 million note and the \$4 million
 4 note had the same eligibility formula; is that right?
 5 A That's correct.
 6 Q Now, am I correct that the repayment of the
 7 \$1.2 million note from the 4 million did not increase
 8 CCI's borrowings? In other words, it merely
 9 transferred the \$1.2 million note under that note to
 10 the \$4 million borrowing; is that correct?
 11 MS. JOYCE: Object to the form of the
 12 question. You can answer.
 13 THE WITNESS: That's correct.
 14 BY MR. SWICHAR:
 15 Q So the borrowing didn't change at all when
 16 the \$1.2 million loan was paid from the \$4 million
 17 line of credit; is that correct?
 18 A No, because now the 1.2 was paid off and
 19 now we only had 4 million.
 20 Q The amount remained the same?
 21 MR. GEBHARDT: Objection.
 22 BY MR. SWICHAR:
 23 Q The amount due to the bank didn't change,
 24 did it?
 25 A The balance due to the bank did not change.

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1 The available credit changed.
 2 Q Now, you stated that the repayment of the
 3 \$1.2 million note did not have any practical effect
 4 as to CCI because the interest rates were the same;
 5 is that fair?
 6 MS. JOYCE: Object to the form of the
 7 question. That's not what the witness said. You're
 8 mischaracterizing her testimony.
 9 BY MR. SWICHAR:
 10 Q Did I mischaracterize your testimony?
 11 A Yes. That is one thing I said that is not
 12 the reason, but I did say that is one of the things
 13 in my thought process.
 14 Q Am I correct in stating that the effect of
 15 the repayment of the \$1.2 million note was to repay a
 16 short-term note that was due to expire the following
 17 month?
 18 A Yes, that's correct.
 19 Q As far as you know, the \$1.2 million note
 20 would become due the following month; is that right?
 21 A That's correct.
 22 Q And we all agree it was a short-term note?
 23 A That's correct.
 24 MR. SWICHAR: Larry?
 25 MR. GEBHARDT: No further questions.

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1 MR. SWICHAR: One second. Off the record.
 2 (Off the record discussion.).
 3 MR. SWICHAR: One more question.
 4 BY MR. SWICHAR:
 5 Q You testified that the \$4 million loan line
 6 of credit had been used to pay the principal interest
 7 that was being paid on the \$2 million equipment loan;
 8 is that correct?
 9 A I wasn't positive about the principal, how
 10 that was handled, but yes.
 11 Q You had no issue with repaying the
 12 principal on the equipment note from the \$4 million
 13 line of credit; is that correct?
 14 MR. GEBHARDT: Objection.
 15 MS. JOYCE: Objection. Go ahead. You're
 16 counsel for the case. Go ahead.
 17 MR. GEBHARDT: Her testimony was and the
 18 questions I asked were to the monthly installments of
 19 principal, not the entire unpaid principal balance
 20 which is what you've asked.
 21 MR. SWICHAR: That's fair.
 22 BY MR. SWICHAR:
 23 Q I want to ask you then, You had no problem
 24 or didn't see any problem with respect to paying
 25 principal monthly on the \$2 million equipment note

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1 from the \$4 million line of credit; is that correct?
 2 MR. GEBHARDT: Objection. You still
 3 stated --

4 MR. SWICHAR: I'm asking her a different
 5 question. I'm entitled to do that. I'll rephrase
 6 it.

7 BY MR. SWICHAR:

8 Q Did you have any problem or any
 9 inconsistency with the loan documents in repaying the
 10 principal monthly on the equipment note from the \$4
 11 million line of credit?

12 MR. GEBHARDT: Objection. You're still
 13 creating a deceptive ambiguity in the use of the word
 14 principal because principal can include prepayments
 15 as well as regularly scheduled installments. The
 16 questions were about the regularly scheduled
 17 installments, not prepayments. She's testified about
 18 prepayments and unscheduled.

19 MR. SWICHAR: I'll rephrase it. Thank you.

20 BY MR. SWICHAR:

21 Q Did you see any problem or inconsistency
 22 with the loan documents in repaying the equipment
 23 note -- from repaying principal in regular monthly
 24 installments for the equipment note from the \$4
 25 million line of credit?

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1 MS. JOYCE: It's the same question. I'll
 2 object. The objection hasn't been cured. I can't
 3 let her answer it because it mischaracterizes what
 4 she said before.

5 THE WITNESS: It's not a repayment.

6 MS. JOYCE: Right. You said that before.

7 MR. SWICHAR: Pardon me?

8 MS. JOYCE: She said it was not a
 9 repayment, which is what she had testified to
 10 previously.

11 BY MR. SWICHAR:

12 Q There were monthly payments of principal
 13 paid on the equipment note; is that correct?

14 A That's correct.

15 Q Those repayments that were made monthly
 16 were paid from the \$4 million line of credit; is that
 17 correct?

18 MS. JOYCE: Objection to your use of the
 19 word repayments since the witness said these were not
 20 repayments.

21 MR. SWICHAR: All right.

22 BY MR. SWICHAR:

23 Q If those payments of principal were derived
 24 from the \$4 million line of credit; is that correct?

25 A That's correct.

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1 Q And you were reducing monthly the principal
 2 that was owed on the \$2 million equipment note; is
 3 that correct?

4 A That's correct.

5 Q And you didn't see any problem or see any
 6 inconsistency with the loan documents in using the \$4
 7 million line of credit to pay monthly -- to pay down
 8 monthly the principal owed on the \$2 million
 9 equipment note?

10 A I actually had talked to Craig Schwartz
 11 about that. He said that -- we had a discussion
 12 about that at one point because we had a payment that
 13 went in late because of something that happened in
 14 accounts payable.

15 Craig had called and said the payment
 16 wasn't paid. After I found out about it, I said
 17 okay. We talked about that; and I said, well, it's
 18 actually drawing of the line to pay this down. But
 19 no, I did not see problems with and knew that is what
 20 was happening.

21 Q And in your discussions with Craig Schwartz
 22 did he indicate that he had a problem in the way that
 23 the equipment note was being repaid -- the equipment
 24 note payments were being made?

25 A Monthly payments, no.

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1 MR. SWICHAR: That's it. It took a while,
 2 but I got there.

3 MS. JOYCE: Okay. Let me place a statement
 4 on the record for the protection of the witness and
 5 the Commonwealth of Pennsylvania, which is her
 6 employer.

7 There's an indication that this case may
 8 potentially be going to trial during the month of
 9 July of 2002. On July 1st of 2002, the Commonwealth
 10 of Pennsylvania will unroll its Imagine PA statewide
 11 computer system of which this witness is an integral
 12 part of unrolling that product for this state.

13 There is currently in place by the
 14 Commonwealth of Pennsylvania a no-leave policy for
 15 its employees who are significantly involved in that
 16 project for the Commonwealth.

17 I'm giving you, both of you as attorneys in
 18 this case, adequate notice of that; so if the case
 19 does proceed during the month of July, alternative
 20 arrangements for Phillips' testimony may need to be
 21 undertaken because of that issue.

22 If you feel, in your estimate, that the
 23 case needs to be moved to a different time frame
 24 because of this witness's unavailability, I'm giving
 25 you adequate notice to do that since there were

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1 obviously prior problems scheduling this witness's
2 deposition.

3 MR. GEBHARDT: What's the time frame on
4 your unavailability? You said July 1. Is it the
5 entire month of July?

6 MS. JOYCE: Yes. It's my understanding
7 that it is the entire month of July; is that correct?

8 THE WITNESS: It could go longer, but July
9 is the critical time frame.

10 MR. GEBHARDT: But June is all right?

11 THE WITNESS: June is all right.

12 MS. JOYCE: In terms of that issue, yes.

13 Obviously, you would have to work around --

14 MR. GEBHARDT: I understand. We had it in
15 June, and it may have been flipped back to June. I'm
16 not positive. Is there likely a problem in August,
17 if they move it to the August date?

18 MS. JOYCE: If the Commonwealth extends its
19 no-leave policy, it could be a problem. We don't
20 know that at this point in time. All we know is for
21 the month of July, the no-leave policy is in effect
22 for those employees who are significantly involved in
23 the project.

24 MR. GEBHARDT: The best thing would be to
25 put it in June.

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1 MS. JOYCE: For this issue, yes.

2 MR. SWICHAR: Well, I'm not consenting to
3 June.

4 MR. GEBHARDT: No, I understand you're not.
5 It's for the judge.

6 MR. SWICHAR: The record will reflect we
7 already requested that it be moved off of June. You
8 may not be aware of that. It had originally been
9 scheduled by June.

10 MR. GEBHARDT: I understand. It was taken
11 off.

12 MR. GEBHARDT: An Order just came back
13 putting it back in June. The judge can move it back
14 to June the same as she moved it to July.

15 MS. JOYCE: Just so you have adequate
16 notice of that issue for your purposes.

17 MR. SWICHAR: We're finished.

18 (The deposition concluded at 1:57 p.m.)
19
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23
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1 COUNTY OF DAUPHIN : SS
2 COMMONWEALTH OF PENNSYLVANIA :

3 I, Hillary M. Hazlett, a Reporter
4 Notary-Public, authorized to administer oaths within
5 and for the Commonwealth of Pennsylvania and take
6 depositions in the trial of causes, do hereby certify
7 that the foregoing is the testimony of

8 SHERI PHILLIPS.

9 I further certify that before the taking of
10 said deposition, the witness was duly sworn; that the
11 questions and answers were taken down
12 stenographically by the said reporter, Hillary M.
13 Hazlett, a Reporter Notary-Public, approved and
14 agreed to, and afterwards reduced to typewriting
15 under the direction of the said Reporter.

16 I further certify that the proceedings and
17 evidence contained fully and accurately in the notes
18 by me on the within deposition, and that this copy is
19 a correct transcript of the same.

20 In testimony whereof, I have hereunto
21 subscribed my hand this 18th day of March, 2002.

22
23
NOTARIAL SEAL
HILLARY M. HAZLETT, Notary Public
Johnstown, Cambria County, PA
My Commission Expires Sept. 29, 2003